Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

KENNETH R. HILLIARD and
GREGORY D. STYLES, Trustees under
Trust Agreement dated May 5, 1979,
Petitioners,

v.

SHELL WESTERN E & P, INC.,
a Delaware corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN A. HILGER
Counsel of Record
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Attorneys for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether the United States District Court and Court of Appeals' reversal of the District Court's Judgment in favor of over 800 class members on the basis of res judicata satisfies due process where the earlier action originally involved Defendant and 13 individual Plaintiffs and the parties to the earlier action expressly agreed to limit the claims to be litigated to one specific issue.

2. Did the United States Court of Appeals deny Petitioners due process by basing its decision on factual assumptions unsupported by the record in its de novo review of an order granting summary judgment, and by failing to remand the case to the District Court for consideration of Petitioners' federal and state constitutional claims?

PARTIES TO THE PROCEEDING

Petitioners

Kenneth R. Hilliard; Gregory D. Styles, Trustee under Trust Agreement dated May 5, 1997, as class representatives for: William H. Acker; Marilyn J. Acker; Advance Management, Inc.; Jack W. Alber; Margaret Alber; Union Pacific Oil and Gas Company; A.M. Fuels/Midland Management Royalty Fund 1983-1 Limited Partnership; A.M. Fuels/Midland Management Royalty Fund 1985-1 Limited Partnership; Amoco Production Company; Morgan W. Anderson and Elma K. Anderson, Co-Trustees of Anderson Trust W; Duane Anderson; First of America Bank Bay City TRE/UWO & Testament of Bessie S. Bradley Decd. FBO Janet Alexander Anderson; Zola L. Anderson; Apache Corporation; Dean A. Archer; John R. Archer; Phillip R. Archer; William T. Archer; Laurance H. Armour, Jr. d/b/a Lamar Properties Oil & Gas Exploration; Kenneth E. Arndt; Mary Jane Arndt; Bernard Asselin, Jr.; Gerald E. Avery; Henry W. Axford, Jr.; Beatrice Axford; Production Credit Association of Traverse City a/c of Henry W. Axford, Jr. and Beatrice Axford; Edward Ayres; James D. Baber; Ann L. Baber; Larry Badger; Cheryl Badger; Meldrum Baerwolf Trust and Dorothy Baerwolf Trust; Baerwolf/Anderson Special Acct.; Mary E. Bahr; Jay C. Thiebaut, Trustee of the Mary E. Bahr Trust; Jay C. Thiebaut, Trustee of Mary E. Bahr Grandchildren Tr.; Society Bank & Trust, Trustee Under D. Bailey, P.T. Bailey & R.H. Nies Title Holding Agreement; Justine W. Bailey; Lucille Ball; Empire National Bank of Traverse City, Successor Trustee of the Roy A. Bancroft Trust; Francis J. Bartosiewicz; Elizabeth L. Bartosiewicz; Richard Behrens; Peter J. Bender; Robert Benetti; Dallas Berryhill; Juanita Berryhill; Juanita M. Berryhill; Douglas E. Biesiada; Gayle M. Biesiada; Joseph P. Biermacher; Old Kent

Bank-Grand Traverse, Trustee of the Howard Z. Bisard Residuary Trust; Florence M. Block; Robert L. Bourne; Theresa L. Bowling Life Estate; Russell B. Bowling, Independent Personal Representative of the Estate of Steven Bowling; Floyd I. Bowling; Ophelia Bowling; Hugh D. Bowling; Hugh D. Bowling; Kathleen Bowling; Kathleen Bowling; Larry J. Bradford; Patricia Bradford; Bradford, Gordon 1986-3 Limited Partnership; William N. Bradley; Helen Bradley; Janet J. Brandt; National Bank of Detroit, Trustee of the Frederick Bradford REV/TR DTD 1/17/84; Harriett Bradford; Larry Bradford; National Bank of Detroit and Larry J. Bradford, Trustees of Bradford Minority Trust; Paul A. Bradford; Paul M. Bradley; Frederick A. Bradford; Carl E. Brandt; James W. Brannan; Hugo E. Braun, Jr.; NBD Bank, N.A. and Edward N. Bradford, Co-Trs. of the Edward N. Bradford Rev. Trust; Vicky L. Brehm; Helen E. Brehm; Vicky L. Brehm; Gordon L. Briley; Lawrence K. Brink; Cleo Brink; Bernard A. Briske; Alice J. Briske; Lawrence K. Brink; Bernard A. Briske; Elden & Elzina Briggs; Brockman Oil Company; Harry F. Brown; Ellen E. Brown; Ronald Brown; Audrey Brown; Charles Brown; H.N. Brumm; John P. Bull; Anthony F. Bunetta; Lorraine E. Bunetta; Michael J. Burskey; Jack G. Burson; Debra L. Burkart; Margaret J. Button; The Detroit Bank and Trust Company, Trustee of the Raymond Butka Trust Acct 33334; George Cailotto; Rex C. Campbell; Beatrice A. Campbell; The Russell J. Carlson Trust; Kenneth L. Carpenter; Lucille Carpenter; Cedar Lane Dairy Farms; Central Michigan Railway Company; Carolyn S. Charters; Barbara S. Cheresh; Joan Y. Weisman; I. Richard Savage; Barbara S. Cheresh; Chesapeake & Ohio Railway Co.; Winston S. Churchill; Mary C. Churchill; William Clare; Rosalie Clare; Gilbert R. Clark; Cora A. Clark; Ila Mae Clayton; Dorothy C. Clark; Keith F. Cline; Margaret Cline; Ralph Clous; Joan Clous; Daniel Clouse; Marie Kay Clouse; Charlotte Coe; Edwin D.

Coe; Nola J. Cole; Joseph Colliton; Jean Colliton; Gloria Schmidt Cone; Conoco, Inc. (Wachovia Bank & Trust Co.); Consumers Power Company; Byron J. Cook Trust; Dolores M. Cook Trust; Harriette C. Cook Trust; William F. Cook, Trustee of the William F. Cook Trust; Raymond Cooley; Carl E. Cooper; Betty A. Cooper; NBD Northwest Bank, NA A/C Countryside Products, Inc.; Ernest A. Coviak; Ilah J. Coviak; Ruth Crawford Trust, Second National Bank, Trustee; Claudie Belle Cronkhite, Suc. Trustee of the Samuel H. Cronkhite Family Trust; Lowell S. Cropp; Annie O. Cropp; David Crow; Doranda E. Crouch; Ruth Eloise Crouch; CSX Transportation, Inc.; Nicholas Cuca; Grace W. Curd; Craig H. Curtiss; Beverly Curtiss; Dorothy L. Czarnecki; Richard E. Dansby; Marion L. Dansby; Farmers Home Administration, A/C of Richard E. Dansby; Richard E. Dansby; Delores M. Darrow; Agnes M. Darbee; Howard Darbee; Glen S. Darrow; Donna Darrow; Antonine V. Dascanio; Sanford P. Dascanio; Ervin P. Davis; DBSV Investments, Inc., a Michigan corporation; Willa H. Decotes; Clyde R. Decker; Thelma J. Decker; Curtis L. Deel; Janet B. Deel; John J. DeLuca; Marlene J. DeLuca; Benjamin H. Dehart; Benjamin H. Dehart; Ruth DeKett; John DeKett; Detroit & Mackinac Railway Co.; Lamont Diefenbach; Norma Jean Diefenbach; Robert C. Dienes; Marie L. Dienes; Dilley, Dewey, Damon & Condon, P.C.; Second National Bank of Saginaw, Trustee for Susan M. Doerfner; Second National Bank of Saginaw, Trustee for William H. Doerfner; Ellsworth Domres; Hildegarde Domres; Richard T. Donahue; James E. Donovan; Holly L. Donovan; Helen Killius Downing; Clarence L. Dracka; Jean Dracka; James D. Dreyer; Randall Drzewiecki; Walter Drzewiecki, Sr.; Walter Drzewiecki, Jr.; Etta E. Duncan; Howard Edwards; Virginia Bishop, Personal Representative of the Estate of Howard Edwards, Deceased; E. Charles Eichenbaum; Old Kente Bank of Kalamazoo, Trustee of the El Mac Hills Resort, Inc. Trust;

Carol Ann Erickson; Harless W. Feagins; Robert A. Felcyn; M. Dale Fenstermacher; Eleanor I. Fenstermacher; Shirley Ferguson; David F. Fink; Old Kent Bank-Grand Traverse, Trustee U/W Dated 3/11/75 Fink Family Trust; First of America Bank-MID Michigan, Successor Trustee of Restated Revocable Trust Agreement dated 7/16/86; First Presbyterian Church of Maple Ridge; Louis F. Fischer; Amelia Fischer; Charles E. Fischer; Elaine J. Fischer; Production Credit Association of Bay City; Fisher Oil Company; Stanley M. Fisher; Douglas E. Foeller; Charlene Foeller; Charles K. Ford; Victor C. Fortino; Sara K. Fortino; Samuel Frankel; Bruce G. Freel; Ann Freel; Jay Bryan Freel; Irene Freel; Maurice A. Freel; Ethel Freel; Michael N. Freel; Susan G. Freel; Patrice Freel; Judy A. Freel; Virgil P. Freel; Harry R. Freyer; Fruit Haven Nursery, Inc.; Lois Fuerst; Corrinne M. Gamache; Marshall & Ilsley Trust Co., Trustee of Maxine R. Gantner Trust f/b/o Carole Priest; Ronald A. Gantner; Benjamin O. Garrett; Tessie Garrett; Felix Gauthier; Catherine Gauthier; Betty J. Gavette Living Trust; Vivian A. Gelo; General Energy Resources & Technology Corporation; Donald Girven, Independent Personal Representative of Walter Girven; Sidney W. Girven; Ruth Goede; Jose Gonzalez; George H. Gordon; Alan L. Gornick; Pauline M. Gornick; A.S. Gottloeb; Harold L. Grams; Janet S. Grams; George Gray; Doris E. Gray; Great Western Oil and Gas, Inc.; Great Lakes Land Company, a Michigan limited partnership; Irene M. Green; Roger Greve; Evelyn M. Greve; Cecil R. Gronlund; Leora Mae Gronlund; Arline Grotz; First of America Bank, Trustee of Gustafson Family Trust; Alma B. Gustafson; Vicki E. Waligorski; Doris Pike Guthrie Michigan Trust for A.K. Guthrie; Howard P. Guthrie; A.K. Guthrie and Guilford L. Jones, Trustees of A.K. Guthrie Michigan Trust for Mary Kate Guthrie; A.K. Guthrie and Guilford L. Jones, Trustees for A.K. Guthrie Michigan Trust for Will Wasson Guthrie; Marie D. Guyton; Stuart H. Haack;

Minnie F. Haack; Erma M. Hall; Vance Hall; Bernard L. Hamilton; Phyllis J. Hamilton; Armond Hansen, Trustee of the A. Hansen Trust; Doris Hansen; Salling Hanson, a limited partnership; John A. Harrigan; Elinor L. Harrigan; Clara Hartley; Thomas W. Hartley; Nancy L. Humphrey; Clarence W. Harju; Carol Harju; Lucille Harju; Leaun W. Harrelson; Louis E. Harrington; The Herbert L. Harrington Self-Trusteed Revocable Trust; Herbert L. Harrington; Dorothy R. Harrington; Frank D. Hart; Walter L. Harvey; Hasso Oil Company; Nannearle Sanders Hash; Carol D. Hawkins; Richard A. Hawkins; Theodore H. Hawkins; Floyd Hayes; Elizabeth Hayes; Gerald Hayes; Rose M. Hayes; Federal Deposit Insurance Corp., Southwest Service Center, a/c Estate of Walter J. Heath; Bernice M. Hegeman; Charles O. Hejl; Charlottte Hejl; George A. Helow; Connie Hency; Lee O. Henry; Eleanor O. Henry; Raymond C. Hensley; Ferva C. Hensley; Donald D. Herman; Rita A. Herman; Dale S. Hess; Ruth L. Hess; Jack D. Highfield; Marjorie Highfield; Russell E. Hilden; Susan K. Hilden; Jean M. Hilliard; Old Kent Bank of Kalamazoo, Personal Representative of the Estate of Earl E. Hilliard; Ernest C. Hilliard; Betty Hilliard; Kenneth R. Hilliard; Jo Hannah Hillard; Kevin A. Hillard; Margaret L. Hilliard; Robert Hilliard; George Hillyer; Margaret Hillyer; Roger Hill; Delmon Hodges; Kenneth R. Hoekwater, Trustee of the Kenneth R. Hoekwater Trust dated 9/27/84; Michael W. Hoey; Linda W. Hoey; Dorothea Hoffman; Elwon Lee Hoffman; Security National Bank a/c Marshall Hoffman, et al.; Old Kent Bank-Grand Traverse, Trustee of the Marshall L. Hoffman Trust; Marilyn W. Holleran; Evert J. Hopwood; Edward W. Horvat, and Joyce N. Horvat, Trustees of the Edward W. Horvat Revocable Living Trust; K.L. Hostutler Trust f/b/o L.A. Hostutler, A.M. Sexton, K.M. Hostutler, L.L. Young and P.S. Honeysett; Howard Land & Minerals, Inc.; Howard Energy Co., Inc.; Albert C. Howard; William P. Huntey; Linda Huntey; Hydrocarbons Investments;

Mercantile Trust & Savings Bank a/c Steven D. Irwin and Ann S. Irwin; Suzanne Irwin; Issof Associates; Jabe Limited, a corporation; M. Loretta Jach; Rick J. Jach; Thomas L. Jakee; June K. Jakee; Richard E. Jakee; Bonny J. Jakee; Mark C. Jansma; Theresa Jaruzel; Anna Jaruzel; Benjamin W. Jayne; Shirley Jayne; Vernon L. Jewell; Vada Jewell; FMB-Security National Bank a/c Althea Johnson & Shirley Mlejnek JT/WRS; Dan L. Johnson; Sally Johnson; Joanne M. Johnson; West Michigan Nat'l Bank, Trs. Mabel L. Johnson Trs 4/22/76, Trs. of Mabel S. Johnson and Victor J. Johnson Trs. 5/12/80; Paul T. Johnson; Frances B. Johnson; Hackley Bank & Trust, NA and Trust Co. as Trustee for Toivo H. Johnson; West Michigan Nat'l Bank, Trs. Victor J. Johnson Trs. 4/22/76, Trs. of Mabel S. Johnson and Victor J. Johnson Trs. 5/12/80; Raymond M. Jones; June Rose Jones; Richard M. Judd; Betty Judd; Harold A. Kapp; Ethel Mae Kapp; Manistee Bank and Trust Co., Trustee of Ronald E. Kamaloski and Betty Jean Kamaloski Trust; Ronald E. Kamaloski; Betty Jean Kamaloski; Aloysius Kanka; Eleonore Kanka; Maurice C. Kaplan; Billie Marthelle Karcher; J. Paul Karcher; Norman Kaskinen; Martha Agnes Kaskinen; Arthur M. Keillor; Leona V. Kelley; Virginia Kelley; Daniel B. Kempa; Judith Kempa; Beverly Anne Kenney; William R. Kerr; Helen Margareet Killius; Anton Kilian; Elizabeth Kilian; John Kilian; Dorothy Smith Kinney; James H. Kirk; Mary Kirk; Gaylord A. Knapp; Shirley E. Knapp; Eileen Kochevar; Eileen M. Kochevan Vickers, Trustee of the Irene M. Kochevar Trust; Anton Raymond Kochevar; George Kohlohf; William F. Komerska, Trustee under Declaration of Trust dated 8/15/77; Anna J. Komrska, Trustee of the Anna J. Komrska Trust; Donald E. Komrska; Mildred Ann Komrska; Comerica Bank, Trustee of the Joseph E. Komrska Trust; Roger R. Komrska; Theresa C. Komrska; Virginia M. Koskela; Virginia M. Koskela; Clifford Koskela; Carol Ann Curry; Carl Kreiser; Margaret Kreiser; Ralph E. Kreiser,

Trustee of the Ralph E. Kreiser Revocable Trust dated 8/21/84; Rose Kress; Gordon G. Kruse; Floyd J. Kubacki; Irene T. Kubacki, Trustee of the Trust Agreement of Irene T. Kubacki; Chester F. Kudla; Lillian T. Kudla; James L. Kyselka; Ellen Frances Kyselka; LNS Company, a partnership; Ladd Petroleum Corporation; Thelma E. Lahr & 2nd Natl Bank of Saginaw, Co-Trustees of the Bernard E. Lahar Restated Trust Agreement dated 2/16/89; Thelma E. Lahar, Trustee of the Thelma E. Lahar Loving Trust u/a/d 2/19/90; Lake Horicon Corporation; Edward Lambert; Eva Lambert; Floyd A. Lambert; Betty L. Lambert; Mervil K. Lambert; Thomas L. Lang; Jerry Arthur Lane; Christine Kay Lane; Delbert Laponsey; Donna Laponsey; Francis Latuszek; Mary J. Latuszek; James F. Lawnichak; Robert G. Lawnichak; John W. Ledford; Barbara L. Ledford; Raymond E. LeDuc; Shirley A. LeDuc; Ilene M. Leighton; Earl F. LeSarge; Beverly R. LeSarge; Evangelene LeSarge; Robert D.W. Landon II, Tr. for Cole P. Lewis U/Instr 10/23/77; Robert D.W. Landon II, Tr. for Gail W. Lewis U/Inst 10/13/77; Ferd W. Limberg; Elizabeth Limberg; Elma Hertle, Successor Trustee of the Otto Lindros Trust; Frank J. Lipinski; Carol J. Lipinski; John D. Lippert; Nancy Wood Loening; Geraldine Longwood; Kenneth A. Lucas; Monti L. Lucas; Gerald Lutz; The Lutheran Home and Service for the Aged, an Illinois corporation; Bernard Lewis Lutz; Calvin C. Lutz, Trustee of the Calvin C. Lutz Trust Agreement dated 7/15/66 as amended 9/6/86; Lorraine A. Lutz, Trustee of the Lorraine A. Lutz Trust Agreement dated 9/6/86; Bernard L. Lutz, as Trustee of the Bernard L. Lutz Trust Agreement of 9/21/91; Robert D. Lyman; Judith D. Lyman; Alphon G. Lyman; Irene M. Lyman; Denise Mack; Janet Madaffer; Olive E. Maghielse; Nancy Mahoney; Rebecca J. Majeske; Mildred Malik; Ronnie D. Mallison; Ruth M. Mallison; James F. Maniccia, Sr. Trust dated 4/18/87, Ronald D. Maniccia and William F. Rolinski as Co-Successor Trustees;

Robert J. Mannes; Rose Mannes; Josephine C. Mannila; Robert H. Manthey; Gordon Manthey; Old Kent Bank & Trust Co., Trustee of the Irene Marcenkowski Trust; Empire National Bank, Trustee for the Donald Marshall Trust; Marshall Enterprises, a co-partnership; Edward Martella; Leona E. Martella; Lockheed-Martin Corp.; Maryanne Lavan; Old Kent Bank and Trust Co., Trustee of the Jerome Marcenkowski Trust; Old Kent Bank and Trust Co., Trustee of the Irene Marcenkowski Trust; Edward Martella, Jr.; Leona Martella; Edward D. Maskeny, Trustee of the Edward D. Maskeny Trust; Edward Maskeny; Security Nat'l Bank a/c Charles E. Mattison and Josephine Mattison; Security National Bank a/c Josephine Mattison; Charles E. Mattison; James H. Maue; Effa L. Maue; Internal Revenue Service a/c Richard Mazur, Levy Proceeds; Richard Mazur; Frank D. McAllister, Jr.; Esther H. McCreery; Betty E. Thomas; West Michigan National Bank, Trustee of the Esther M. McCague Trust; West Michigan National Bank, Successor Trustee of the James M. McCague Trust; John H. McCarthy; Michael B. McClintic; George F. McCreery; Ester McCreery; Mildred McDaniel; Harold A. McLaughlin; Dorothy L. McLaughlin; Finley B. McNeil; Lucille McNeil; Norma Jean Meacham; William C. Medford; Sharon Ann Medford; Gerald E. Meister; Lila A. Meister; Donald W. Meister; Kay D. Meister; Darwin O. Meister; Delbert G. Meister; Donald W. Meister; Old Kent Bank & Trust Company a/c Ellis E. Meister; Gerald E. Meister; Joel D. Meister; Rita E. Merkey; Henry Merkel; Mary B. Merkel; Martin Merkel; Ann M. Merkel; Joseph E. Merkel; Charles W. Merriam III; Carolyn Merriam; Herbert T. Merrill; Wilma Merrill; Edna Meyer; Chemical Bank & Trust Company, Successor Trustee of the Lewis Lantz Michelson, Sr. Trust; Chemical Bank & Trust Company as Successor Trustee of the Lewis Lantz Michelson, Jr. Trust; Mich-Tex Royalty Company; Mid Mich Minerals Limited Partnership; Mid-West Royalties; Gregory P.

Migliore; Rose Marie Migliore; Leon S. Millard; Elaine M. Millard; Henry A. Miller; Shirley G. Miller; Leon S. Millard; Ronald A. Miller; Carol S. Miller; Rose A. Miller; Carl F. Mills; Joyce A. Mills; Roxane Anderson Miner; Kathryn M. Mlcek; George A. Moberly; Standard Federal Bank for the Account of John T. Monarch; Monitor Sugar Company; Terrance E. Morley; Cheryl S. Morley; Robert Mosbacher; Charles J. Moskowitz; Ruth Moyer; Theresa E. Moy; William Moy; Lorin C. Moyer; Ruth Moyer; Internal Revenue Service-Levy Proceeds for the Account of Roger Muldavin and Jean Ann Muldavin; Roger Muldavin; Jean Ann Bowling Muldavin; Robert L. Mund; Robert L. Mund; Lillian H. Mund; Wanda Muse; Natalie Hunt; James Muslow; A. Claire Mutch and Harry L. Mutch, Co-Personal Reps. of the Estate of Mary W. Mutch, Deceased; First National Bank of Gaylord for the Credit of Bruno C. Muzyl and Jane R. Muzyl; Bruno C. Muzyl; William C. Myers; Anthony V. Myszkier; Johanna Myszkier; Harry C. Nelson, Trustee of the Harry C. Nelson Trust; Patricia Nelson, Trustee of the Patricia Nelson Trust; J.C. Newman; Anna E. Newman; John C. Neyer; Kenneth D. Neyer; Diane Y. Neyer; Old Kent Bank-Grand Traverse, a/c Kenneth D. Neyer and Diane Y. Neyer; Robert J. Neyer; Isabella Bank & Trust for the Commercial Loan Account of Robert J. Neyer; Traverse City State Bank a/c Robert J. Neyer; Bobby Nichols; Clyde Neisen; Grace J. Neisen; Harold O. Nobbs; Henry F. Nobbs; Old Kent Bank-Grand Traverse, Trustee of the Jane E. Norton Revocable Intervivos Trust #1; Charlotte Nugent; Evelyn J. Nugent; Robert W. Nugent; Neil W. Nystrom; Dorothy Nystrom; Old Kent Bank-Grand Traverse, Trustee of the Ralph J. Ockert Trust; Allen O'Dell; Jean O'Dell; Felix Olszewski; First of America Bank, Grace J. Niesen, Trustees of Olsen Trust dated 11/25/75; First of America Bank & Grace J. Niesen, Trustees of Jennie L. Olsen Trust; First of America Bank, Trustee of Albert T. Olson; Jean Kerr

Olson; Felix Olszewski; Genevera F. Olszewski; Central State Bank a/c Frank J. Orsini; Michael C. Osband; Nellie Osband; Edward D. Ososki; Stanley S. Styles and Gregory D. Styles, Trustees of the Dyann M. Otero Trust Agreement dated 9/24/75; Nedra J. Otis; Thomas A. Otten; Sandra Otten; Vera G. Oviatt; Packaging Corp. of America; Tenneco Oil Company a/c of Packaging Corporation of America; E.J. Packwood; Arthur J. Pahl and Donald R. Pahl, Co-Trustees of the Arthur J. Pahl Revocable Trust; Clarence Pahl; Rudolph Palombit; Bernadette Palombit; Nan Patton, Personal Representative of the Estate of Richard Earl Patton; Donald M. Patten; Joseph F. Paulus; Kathryn Stanley Paulus; Lenard W. Pearson; George A. Percha; A.K. Guthrie & Guilford L. Jones, Trustees for Mary Lynne Perry Michigan Trust for Brian Howard Perry; A.K. Guthrie & Guilford L. Jones, Trustees for Doris P. Guthrie Michigan Trust for Mary Lynne Guthrie Perry; Doris Pike Guthrie Michigan Trust for Mary Lynne Guthrie Perry; Mary Lynne Guthrie Perry Michigan Trust for Brian Howard Perry; John Pewinski, Trustee of the John Pewinski Living Trust; Old Kent Bank & Trust Company, Trustee of the Pewinski Family Trust; Robert F. Philp, Trustee under the Pour-Over Trust of Robert F. Phlip Dated 2/15/90; T.T. Phillips, Jr.; Robert Philp; Phoenix Petroleum Co.; Virginia L. Pieper; Richard J. Pieper; Donald G. Pike; Delores M. Pike; Viola Pirvu, Personal Representative of the Estate of John Pirvu, Jr.; John Pirvu, Jr.; Viola Pirvu; Paul Plagany; Marion M. Plagany; Paul J. Plagany; Cletus S. Plamondon; Eva E. Plamondon; August J. Pomaville; Lottie Pomarzynski; Mary Pontisso Trust, Mary Pontisso & Joseph Cusin, Trustees; William A. Porter; Kathleen Porter; Stuart W. Porter; Myrna Porter; William A. Porter; Kathleen G. Porter; Preston Oil Company; David R. Prior; Doreen P. Prior; William L. Prior; Bernice Prior; Arnold R. Prosch; Frances Wadsworth Pross; Elaine Pross; Anna Ingeborg Hanson Raae & Old Kent Bank & Trust Co.,

Trustees for Anna Ingeborg Hanson Raae u/t/a dated 2/5/85; Kenneth A. Schwark, Successor Trustee of the Helen Rachow Trust dated 12/22/82; Helen Rachow; Alfred Radtke; Ramoco, Inc.; Kenneth M. Ramsay; Mona Ramsay; Morris D. Ramsay; Wilma J. Ramsay; Elaine Rapanos; William E. Rasmussen; Norma Rasmussen; William T. Rasmussen; Christine M. Rasmussen; Old Kent Bank-Grand Traverse, Trustee of the Frank I. Rawlings Family Trust; Jerome A. Ray; Karen M. Ray; Charles J. Reamer; Vernon A. Reckow, Trustee of the Vernon A. Reckow Revocable Trust dated 11/12/82; Marjorie L. Reckow, Trustee of the Marjorie L. Reckow Revocable Trust dated 11/12/82; First of America Bank, Trustee of Majorie L. Reckow Trust; First of America Bank, Trustee of the Vernon A. Reckow Trust; The Cadillac State Bank a/c Robert C. Redman; Reef Energy Corporation; June C. Rengo; Raymond A. Rengo; Robert E. Rengo; Estella Rhoads; Harley B. Rice; Willis James Roberts; Helena Roberts; Nelson A. Miles, Conservator/Guardian of the Estate of Helen B. Roblin & Ralph H. Routier; Nancy M. Rogers; Lisa Rossi, Personal Rep. of the Estate of Albert J. Rossi, Deceased; Albert J. Rossi; Eleanor M. Rossi; Judith C. Rouse; Ralph H. Routier; Patricia G. Rovsek; Sandra J. Rovsek, Trustee of Sandra J. Rovsek Trust dated 8/15/74; Rose P. Rudy; James E. Rudy, Sr.; Frederick Ruegsegger; Mary Josephine McKnight Runge; Comerica Bank, Trustee of the Thomas E. Rush, M.D. Trust; Alice Patricia Ryckman; SHR Limited Partnership; SHR Limited Partnership; Joyce Boucher Sabel; Linda Saddler Martin; Marian Saddler; Arthur M. Salo; Paul E. Salo; Elna A. Salo; Norman A. Samkowiak; Shirley A. Samkowiak; Merrill Lynch a/c Sand Bay Company; Prudential-Bache Securities a/c Sand Bay Co.; Julian A. Sanak; Esther J. Sanak; I. Richard Savage; Joseph W. Schuman; Judith A. Schuman; Harvey Schimke; Helmi Schimke; Theodore E. Schimke; Walter Schuimke and Audrey Schimke, Joint Tenants With Right of Survivorship;

Ruby Schwartz; John F. Schmuckal, Jr.; Josephine M. Schmuckal; Elmer Schmuckal; Rose Schmuckal; Empire National Bank, Trustee of the Elmer A. Schmuckal Irrevocable Inter Vivos Trust; Howard R. Schoenberger; Dorothy L. Schoenberger; Kenneth E. Schreur, as Trustee u/t/a of 8/24/78; Gary R. Schwaiger, Pamela S. Hudson and West Michigan Nat'l Bank, Co-Trustees of the Natholee C. Schwaiger Trust; Gordon P. Schroeder, Jr.; Richard L. Schroeder; Sylvia M. Schroeder; Arthur J. Schwaiger; Natholee C. Schwaiger; Esther C. Schuman Life Estate; Richard Schuster; Dorothy Schuster; John D. Sedelmaier; Hazel M. Sedelmaier; Old Kent Bank-Grand Traverse, Trustee of Ann E. Sedlar Revocable Trust of 8/12/81; Old Kent Bank-Grand Traverse, Trustee of Peter C. Sedlar Trust; Wilbur H. Seitters; Hazel M. Seitters; Donadl H. Sellke; Deanna S. Sellke; Elroy P. Sellke; Donna Sellke; Louis E. Shaffer; Mary A. Sheehan; George C. Short, Jr.; Mary K. Short; Glynn J. Silverthorn; Anne M. Silverthorn; Lila H. Simcox, James H. Simcox and Marilyn E. Chapman, Trustees of the Howard G. Simcox Family Trust; George J. Simon; Magdalene Simon; Lawrence Simon; Emma B. Simpson, Trustee of Emma B. Simpson Trust; William Simpson; Gladys L. Sinn; Sioux Corporation, Inc.; Stanley Siuda; Rita Siuda; Kelly Six; Emaline T. Six; Virgil J. Skiera, Jr.; Sharon A. Skiera; Jerome R. Skocelas; Catherine R. Skocelas; Glenn E. Slucter; Agnes K. Slucter; Northwestern Savings Bank and Trust of Traverse City, Successor Trustee of the Smith Family Trust; James E. Smith; Olive C. Smith; Louis A. Smith; Richard Sands Smith; South Coast Terminals, Inc. Profit Sharing Plan & Trust; John Spedoski; Marianne I. Spedoski; Leona F. Spedoski; William T. Spencer; J.J. Spielberg; Michigan Natl Bank a/c William L. Staley; Stangor Land Co. Sandra J. Steele; Juanita M. Steinebach; Doris A. Steketee; Old Kent Bank Grand Traverse, Trustee of the Pierce Stocking Marital and Family Trusts; Aileen P.

Stocking, Trustee of the Aileen P. Stocking Self-Trusted Trust dated 11/9/79; Frederick F. Strale; Mary Ellen Strale; William J. Strickler; The Champaign National Bank, Trustee for Shirley Kreason Strout Revocable Living Trust; Peter W. Strumbos; Nicholas P. Strumbos; George T. Strumbos; Champaign National Bank, Trustee Under Declaration of Trust of Ross P. Strout; Emily M. Stump, Trustee of the Emily M. Stump Revocable Trust dated 3/18/92; Stanley S. Styles and Gregory D. Styles, Trustees of the Douglas Styles Trust Agreement dated 9/22/75; Gregory D. Styles, Trustee Under Agreement dated 5/11/79; First of America Bank, Trustee of Fred W. Sundbeck and Myra Sundbeck; Old Kent Bank-Grand Traverse, Trustee under Svec Family Trust dated 10/25/74; Gerald J. Talbot; Peoples National Bank & Trust Co., Trustee u/w/o Minnie L. Talbot; Estate of Clarice Tapson, Deceased; First of America Bank Bay City, TRE/UWO Harold F. Bradley, Deceased; First of America Bank Bay City TRE/UWO Bessie S. Bradley, Deceased; John Thaut; Robert W. Thieman; Jane A. Thieman; Freida Thomas; Rollin D. Thomas; Mary J. Thomas; Thomas W. Thomas; Carol Gould Thompson; John G. Thompson; Kenneth E. Thompson, Trustee of the Kenneth E. Thompson Trust Account; T.T. Thompson; First of America Bank Bay City TRE/UWO Bessie S. Bradley, Deceased; Fred C. Tinsey, Jr.; Barbara Ann Tinsey; Paul W. Tinsey; Frederick C. Tinsey, Jr.; E. Diane Tope Living Trust u/a dated 5/16/91; H.E. Tope, Inc.; Irwin J. Traines; Lois E. Traines; Tres Ritos Oil Co.; Robert E. Tucker, Jr.; First of America Bank, Trustee of Alex Tuisku Trust; USX Corporation; H.L. Brown, Jr.; Upper Mulvaney Resources Group; Arlene B. Vacek; Zoltan J. Vagi; George Valek; Gloria Isabella Valliere; Virgil VanTol; Eileen VanTol; Dorothy VanDorsten; Charles VanDorsten; Old Kent Bank and Trust Co., Trustee of the Veraghen Family Trust; Old Kent Bank & Trust Company, Trustee of the Martin G. Veraghen Residual

Trust; Old Kent Bank & Trust Company, Trustee of the Vera V. Veraghen Trust; George R. Verscheure; Janet J. Verscheure; Alice Vier; Viking Recreational Club; Virgil D. Vinecki, Trustee of the Revocable Living Trust of Virgil D. Vinecki u/a/d/ 9/20/82; Virgil D. Vinecki; Theresa L. Vinecki; West Michigan National Bank, Successor Trustee of Edward J. Viol and Marie G. Viol Trust; Clifford Voigt; Donna Voight; Samuel Voight; Gertrude Voigts; Thelma L. Walker; Lyle F. Wallace; Jean B. Wallace; Beatrice Walraven, Beverly J. Covieo, Arthur W. Walraven, Jr. and Frederick A. Walraven as Trustee JT/WRS; Edwin P. Walter; Eleanor C. Walter; Gerald L. Walter; Harriet Walter Life Estate; Harriet J. Walter; Marvin J. Walter; Ruth J. Walter; Arthur Walton; Edwardine A. Walton; Wanda Walter; L. Brent Walton; Norma E. Walton; Irene Ware; Old Kent Bank-Grand Traverse, Trustee under Waslawski Family Trust Agreement dated 5/22/75; Elizabeth Ann Waterhouse, Trustee; Elizabeth Ann Waterhouse; Marguerite E. Weaver; Melvena L. Weber; Jenette M. Weber; Robert J. Webber; Joseph L. Weber; Jenette M. Weber; Mose D. Weber; Melvena L. M. Weber; Empire National Bank, Trustee of the Norine E. Weber Trust; Edward Wedholm; Doris Wedholm; Joan Y. Weisman; Donald P. Weiss; Gayleen B. Weller as Trustee of the Gayleen B. Weller Living Trust dated 2/16/88; Henry L. Weller; Hilda E. Weller; Gayleen B. Weller and Richard L. Weller, Succ. Co-Trustees of the Richard A. Weller Living Trust; Gullan M. Wellman and Alan F. Stone, Personal Reps. of the Estate of Arthur O. Wellman; Marlene R. Weller; Howard G. Wendland; First of America Bank-Mid Michigan NA and Charles K. Ford, Co-Trustees of the Howard G. Wendland Trust; First of Ameirca Bank-Mid Michigan NA and Charles K. Ford, Co-Trustees of the Robert Wendland, Jr. Trust; Adeline K. Werp; Victor Werp; Francis J. Wery; Western Royalty Co.; Kenneth R. Widgren; Howard R. Wieland; Jacques L. Wiener, Jr.; William B. Wiener, Jr.;

Michael Johnston, Trustee of the Louise Willick Revocable Trust; Barnett Banks Trust Company and Everett Redmond, Trustees of E.M. Wild Trust; Ione I. Wiles; Russell F. Files; Marvin L. Wilkie; Marjorie E. Wilkie; Geraldine M. Willey; Athel E. Williams; Helen C. Williams; Michael Johnston, Trustee of the Louise Willick Revocable Trust; Harry C. Williams, Trustee Under the Harry C. Williams Agreement of Trust dated 10/15/81; Wilton Limited Partnership No. 1; Wilton Oil Co.; John E. Winkler; Ruth L. Winkler; Sadie Wirbel; Old Kent Bank-Grand Traverse, Trustee of Delia C. Wise Revocable Trust; Donald N. Wise; Elizabeth Wise; Mary Dee Wise; Robert L. Wise; Northwestern Savings Bank & Trust, Successor Trustee of the Robert M. Wise Trust Agreement; Wistrand Statewide Realty of Traverse City, Inc.; Cleo C. Wolf; Margaret M. Wolf; Wolverine G and 0-2142604; John W. Wood; Eileen L. Wood; Norwest Bank Excelsior; Menold Crawford Hippler & Co.; C/O Barnett Bank of Lee County a/c Warren W. Wood; Martin R. Woodhams; Linda Woodhams; Donald A. Wright; Barbara M. Wright; Old Kent Bank-Grand Traverse, Trustee of the Alois J. Wurm and Rose T. Wurm Trust; Marguerite F. Yahr; Joseph Yakubowski; Donald E. Yohe; Robert Zaschak; Sandra A. Zaschak; Donovan Ziehm; Joyce Ziehm; Joanne Zimmerman; Grace E. Zimmerman; Jack W. Zimmerman; Joanne Zimmerman, Personal Representative of the Estate of Jack W. Zimmerman, Deceased; Jo Anne Zimmerman; Richard W. Zimmerman; Joseph F. Zupin; Marcella A. Zupin; Martha M. Zurbrigg; David Ricky Edge; Larry Horton; Morton D. Aulls; Ronald J. Brewer, PC; James R. Temple; Charles W. Borgsdorf; Roger Wood; Tom Lewis; Freidolph K. Olson; Frances E. Kerr.

Respondent

Shell Western E & P, Inc.

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The United States Court of Appeals for the Sixth Circuit issued its unpublished opinion on May 22, 1998. A copy of the opinion is included in the appendix at page 22a. (App. C; pp. 22a-34a)[1] The United States District Court for the Western District of Michigan, Southern Division, ordered entry of the final judgment on March 20, 1996. A copy of the order and the final judgment is printed in the appendix at page 23a. (App. F; pp. 42a-51a)

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on May 22, 1998. On June 3, 1998, Petitioners filed a Petition for Rehearing and for Rehearing En Banc (App. B), which the United States Court of Appeals denied on July 6, 1998. (App. A) This Petition for Writ of Certiorari is being filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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[1] Citations to "App." are to the appendix filed with this petition for writ of certiorari pursuant to Supreme Court Rule 14(i).

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, art. IV § 24

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

Mich. Const. 1963, art. IV § 32

Every law which imposes, continues or revives a tax shall distinctly state the tax.

MICHIGAN SUPERVISOR OF WELLS ACT

Mich. Comp. Laws Ann. §§ 319.1 - 319.27 (West 1984). (App. M)

MICHIGAN OIL AND GAS SEVERANCE TAX ACT

Mich. Comp. Laws Ann. §§ 205.301 - 205.317 (West 1986). (App. N)

STATEMENT OF THE CASE

This case is factually uncomplicated. Petitioners are owners of royalty interests as lessors of mineral rights in oil and gas produced from wells owned and operated by Shell Western E & P, Incorporated ("Shell"). A previous lawsuit raised challenges to Shell's practice of deducting from their royalty payments a tax levied as Michigan's Oil and Gas Severance Tax, Act 48 of the Michigan Public Acts of 1929, as amended, Mich. Comp. Laws Ann. § 205.301 et seq. ("Act 48"). Although the leases contained no specific authority for the severance tax deduction, the Michigan Court of Appeals upheld Shell's practice. *Brown v. Shell Oil Co.*, 128 Mich. App. 867 (1983), *reh'g denied, appeal denied*, 424 Mich. 867 (1986) *cert. denied*, 479 U.S. 824 (1986). Following the Court of Appeals' decision on the Act 48 claim, *Brown v. Shell* was settled as a class action addressing limited issues and specifically excluding Act 48 issues. (App. L)

Six years after the *Brown* settlement, Petitioners discovered that Shell made a practice of deducting from the royalty checks due Petitioners a privilege fee assessed against Shell pursuant to the Michigan Supervisor of Wells Act, Act 61 of the Michigan Public Acts of 1939, as amended, Mich. Comp. Laws Ann. § 319.1 et seq. ("Act 61"). (App. M) Shell disguised its deduction of Act 61 privilege fees by including it in the "taxes" description of deductions on the royalty check stubs. After discovering Shell was wrongfully deducting the Act 61 fee, Petitioners filed this class action in the Circuit Court for Grand Traverse County, Michigan, alleging breach of contract, fraud, and violation of RICO (18 U.S.C. § 1341), and challenging the constitutionality of Act 61 if interpreted to impose liability on royalty owners. (App. K) Shell removed the case to the United States District Court for the Western District of Michigan, invoking that court's federal question

jurisdiction.

Petitioners contended that, because Act 61's definition of "producer" excluded royalty owners, they could not be held responsible for payment of the privilege fee absent a contractual obligation to do so. The District Court agreed, rejecting Shell's position that the Act 48 definition of "producer," which includes royalty owners, should be read into Act 61. Because the undisputed language of the leases nowhere contained a provision allowing Shell to deduct the Act 61 privilege fee from royalty payments, on November 2, 1993, the District Court granted Petitioners' Motion for Partial Summary Judgment, finding that Shell's deduction of the Act 61 fee constituted a breach of contract. Because the District Court found that the language of Act 61 did not impose the privilege fee on royalty owners, the District Court granted summary judgment for Petitioners on their breach of contract claim and dismissed Petitioners' constitutional claims as moot. (App. J)

Shell claimed that the earlier case, *Brown v. Shell*, *supra*, precluded Petitioners from bringing this action. The District Court disagreed and denied Shell's motion for summary judgment on the issue of res judicata, indicating that the record did not demonstrate whether Petitioners were aware or could have become aware of the Act 61 deductions at the time of the *Brown v. Shell* action, or whether Petitioners had the opportunity to raise those claims in the *Brown v. Shell* action. (App J) Shell raised the res judicata issue in two subsequent motions, both of which the District Court denied. (App G & H & I)

In May, 1995, Petitioners' RICO claims were dismissed voluntarily, leaving only the pendant state claim for breach of contract. The District Court denied Shell's request to remand the action to state court, and on March 20, 1996, the District Court entered a final order awarding Petitioners damages for

breach of contract to be measured by the Act 61 deductions taken from royalty payments. (App. F)

Shell appealed the final judgment to the United States Court of Appeals for the Sixth Circuit. Following oral argument, the Court of Appeals issued an order certifying questions to the Supreme Court of Michigan. Being of the opinion that "resolution of the issues raised in this case may well have a significant impact on Michigan jurisprudence and upon the public fisc," the Court of Appeals certified the following questions to the Supreme Court of Michigan:

> (1) Whether, under the doctrine of res judicata, a group of property owner lessors, who previously challenged their lessee oil and gas driller's practice of deducting a pro rata share of Act No. 48 taxes from land owners' royalties, and who knew or should have known that the tenant lessee driller was at the same time deducting a share of the Act No. 61 fee, is precluded from now litigating the Act No. 61 deduction; and
>
> (2) Whether the correct interpretation of § 22 of Act No. 61, which imposes a fee on "oil and gas produced," and which incorporates Act No. 48's provision for collecting taxes from "producers" of gas and oil, also requires incorporating Act No. 48's definition of "producer" or whether Act No. 61's definition of "producer" should be inserted into Act No. 48's collection scheme, despite the fact that the term "producers" is not used in § 22 of Act No. 61.

(App. E)

On February 24, 1998, the Supreme Court of Michigan entered an order declining the request to answer the certified questions. (App. D) On May 22, 1998, the United States Court of Appeals issued its opinion which begins with the following explanation:

> RYAN, Circuit Judge. A word of explanation is in order concerning the delay in rendering our opinion in this case.
>
> Because the issues brought to us on appeal are exclusively questions of state law, we certified these issues to the Michigan Supreme Court on October 22, 1997, asking it to decide the questions. On February 26, 1998, we received a one sentence order from the Michigan Court declining 5-2 our request to answer the questions certified. No reason for the declination was given. We proceed therefore to resolve these questions of Michigan law in this unpublished opinion since what we say is not precedential.

(App. C; p. 22a-23a)

The Court of Appeals reversed the District Court's judgment and remanded for entry of judgment for Shell, concluding that res judicata barred Petitioners' claim. The court further concluded that the District Court had misinterpreted Michigan law. According to the Court of Appeals, even though royalty owners are not "producers" as that term is defined in Act 61, they are nonetheless responsible for the privilege fee imposed on producers by that act by virtue of the definition of "producer" in Act 48 -- a definition that includes royalty owners. (App. C) On June 23, 1998, Petitioners moved for rehearing and for rehearing en banc, asserting not only that the Court of Appeals had based its

decision on erroneous assumptions and factual determinations unsupported by the record, (App. B; pp.4a-8a) but also that it had ignored Michigan legislative history (App. B; pp. 12a-13a), rules of statutory construction. (App. B; pp. 13a-16a), as well as Michigan case law, including *Mobil Oil Corp. v. Dep't of Treasury*, 422 Mich. 473; 373 N.W.2d 730 (1985), which ruled that a royalty owner is not involved in production. (App B; pp. 16a-17a) Petitioners further asserted that by directing entry of judgment for Shell, the Court of Appeals denied Petitioners their due process rights to challenge the constitutionality of the application of Act 61 as it applied to them. (App. B; pp. 17a-19a) The Court of Appeals denied the petition on July 6, 1998. (App. A)

ARGUMENT FOR GRANTING WRIT

The Court of Appeals' decision constitutes an egregious violation of Petitioners' due process rights. On the basis of assumption and erroneous factual determinations unsupported by the record, the Court of Appeals reversed the District Court's carefully considered opinions (App. G, H & I) and decided the doctrine of res judicata barred Petitioners' action. In determining that res judicata barred Petitioners' action, the Court of Appeals completely disregarded the fact that *Brown v. Shell* was not originally a class action, but involved only 13 individual plaintiffs, that *Brown v. Shell* involved a different claim than the claim involved here, and that the parties to the *Brown v. Shell* litigation specifically agreed that only the Act 48 issue would be litigated in that action.

The Court of Appeals also denied Petitioners' right to due process by interpreting Act 61 in a way that precludes Petitioners' recovery without allowing them the opportunity to present their constitutional challenge to that court's improper interpretation of the statute.

ARGUMENT I

The Court of Appeals' determination that Petitioners' claims were precluded by *Brown v. Shell* denied Petitioners due process.

According to Michigan's broad rule of res judicata, a prior action bars not only claims actually litigated in that action, "but every claim arising out of the same transaction which the parties, exercising reasonable diligence," **could have raised but did not**. *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147, 160; 294 N.W.2d 165 (1980); *Curry v. Detroit*, 394 Mich. 327, 332; 231 N.W.2d 57 (1975); *Gursten v. Kenney*, 375 Mich. 330, 333-335; 134 N.W.2d 764 (1965); *Courtney v. Feldstein*, 147 Mich. App. 70; 382 N.W.2d 734 (1986) (emphasis added).

A prior judgment will constitute a bar to a claim in a subsequent action when: (1) the first action was decided on the merits; (2) the matter contested in the second action was or could have been resolved in the first action; and (3) both actions involve the same parties or their privies. *Curry*, *supra*. The individual parties to the *Brown v. Shell* action stipulated to limit the issues addressed in that litigation to the application of Act 48 before the remaining issues were resolved by the class action settlement. Therefore, Petitioners' Act 61 claims were not and could not have been raised in the *Brown v. Shell* litigation, and thus, this action is not barred by the doctrine of res judicata. The Court of Appeals denied Petitioners' due process rights by deciding otherwise.

In *Hansberry v. Lee*, 311 U.S. 32, 37 (1940), this Court held that the Due Process Clause of the Fourteenth Amendment is violated when a judgment in a prior action is used to bind litigants who were not parties and were not adequately represented. This Court recently reaffirmed *Hansberry* in *Richards v. Jefferson County*, 517 U.S. 793 (1996), a case

similar to the instant case.

In *Richards*, a class representing all nonfederal employees subject to Jefferson County, Alabama's occupational tax brought suit challenging the constitutionality of the tax. Jefferson County moved for summary judgment, arguing that a prior adjudication of the tax in an earlier action brought by the City of Birmingham and two city officials, which was consolidated for trial with a suit brought by three county taxpayers, barred the action. The trial court granted the motion as to the state constitutional claims, but refused to grant the motion as to the federal constitutional claims as those claims had not been decided in the prior adjudication. *Id.* at 795-796. The Alabama Supreme Court ruled that the prior adjudication barred both the state and federal issues because the federal constitutional issues had been raised in the first case and could have been adjudicated, and the taxpayers in the first case adequately represented the interests of the class members in the second case. This Court held that the Alabama Supreme Court's application of res judicata denied the petitioners due process of law. *Id.* at 797.

This Court recognized that while states "are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes, . . . extreme applications of the doctrine of res judicata may be inconsistent with fundamental federal rights." *Id.* This Court unanimously held that application of res judicata violates due process where the parties to the first action failed to adequately represent the class members in the second action, and where class members in the second action received no notice that the first action would conclusively resolve their legal rights. The District Court recognized that principle when it rejected Shell's affirmative defense of res judicata. (App J)

Applying the reasoning employed by this Court in *Richards* to the instant case, the Court of Appeals' holding that

Petitioners are bound by the adjudication in *Brown v. Shell* deprived them of the due process of law guaranteed by the Fourteenth Amendment.

> **Because most of the 864 class members involved in this action were not parties to the Act 48 litigation in *Brown v. Shell*, their claims cannot be barred by that decision.**

Just as the class members in *Richards* were not parties to the prior adjudication involving the City of Birmingham and five individuals, the vast majority of Petitioners in this case was not party to the Michigan Court of Appeals' decision on Act 48 in *Brown v. Shell.* The First Amended Complaint in *Brown v. Shell* named only 13 individual plaintiffs. Shell filed a motion for partial summary judgment dealing exclusively with the Act 48 severance tax issue, which the trial court granted. The Act 48 severance tax issue was severed from the rest of the plaintiffs' claims and appealed to the Michigan Court of Appeals. The remaining issues were left to be litigated between Shell and the 13 individual plaintiffs. Those issues were ultimately settled and, on March 29, 1984, the parties in *Brown v. Shell* filed a Motion to Approve Settlement which specifically indicated that the settlement had no effect on the Act 48 severance tax issue and settled only those claims specified in the settlement and agreed-upon notice to the class. (App L; pp. 137a-199a)

Pursuant to the settlement agreement, the parties in *Brown v. Shell* agreed to class certification only as to those claims settled. The class certification in no way related to the Act 48 severance tax issue. As such, the Act 48 severance tax issue was never litigated by or made a part of the *Brown v. Shell* class. Accordingly, the Court of Appeals statement that the 864 current class members were part of "another class which sued Shell Western, claiming that the Act 48 deductions breached the parties' lease," is contrary to the facts of the case.

(App. C; p. 24a) The Court of Appeals' holding that Petitioners, who were not parties to the *Brown v. Shell* Act 48 litigation, are bound by that prior adjudication denies Petitioners' right to due process of law.

> **Pursuant to the express agreement of the parties, the Act 61 claims raised in this case were not and could not have been litigated in *Brown v. Shell***
>
> As this Court noted in *Richards*,
>
> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support. . . . A State may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is, or was, afforded to him some real opportunity to protect it.

Richards, *supra* at 804.

The Court of Appeals' holding that *Brown v. Shell* bars Petitioners' Act 61 claim denies them due process of law by foreclosing their opportunity to present that claim when they had no opportunity to do so in *Brown v. Shell*.

Early in the *Brown v. Shell* litigation, Shell agreed to limit the scope of the court's inquiry to the Act 48 severance tax issue. Specifically, Shell and the 13 individual plaintiffs stipulated to an order granting a motion to amend which expressly provided:

> ***[J]udicial economy makes advisable the limiting of issues to be litigated*** to two: the

> propriety of defendant charges imposed upon plaintiffs for certain operations of the Kalkaska gas plant and further, ***defendants imposition upon plaintiffs of a portion of the severance tax chargeable to the individual wells***. (App. L; p. 134a) (emphasis added)

By express agreement of the parties to the prior action, Act 61 was not litigated in *Brown v. Shell*. Pursuant to the parties stipulation, Act 61 issues could not have been litigated in that action. This Court cannot sanction Shell's attempt to use the stipulation in the *Brown v. Shell* litigation as a sword. As this Court has noted:

> **[A] prior proceeding, to have binding effect** on absent parties, **would *at least* have to be** "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is **so conducted as to insure the full and fair consideration of the common issue."**

Richards, *supra*, at 801, quoting *Hansberry*, *supra*, at 43 (emphasis added).

The Court of Appeals' determination that the decision in *Brown v. Shell* barred Petitioners' Act 61 claim is patently unfair, inconsistent with the res judicata doctrine, and denies Petitioners' due process rights. Shell cannot agree to limit the scope of litigation and then use that limited adjudication to defeat subsequent unrelated claims. To allow Shell to do so deprives Petitioners of any opportunity to protect their rights. The Court of Appeals' decision authorizes Shell to renege on its commitment and promise included in the stipulation and agreement to settle the *Brown v. Shell* litigation. Such a decision is incompatible with due process.

The Act 61 claims raised in this action are different in kind and different in time than the Act 48 claims adjudicated in *Brown v. Shell*

The Court of Appeals incorrectly assumed that "plaintiffs' claim that Shell Western has breached the ***same*** leases by deducting the Act 61 fee . . . " (App C; p. 24a)(emphasis added) The leases at issue in this case are not the same leases at issue in *Brown v. Shell*. Although the lease forms are the same, the breaches alleged by the 13 individual plaintiffs in *Brown v. Shell* in no way cover the 864 leases breached in this case. In any event, the Court of Appeals' statement that both this action and *Brown v. Shell* were based on the same leases, i.e. the same lease forms, implies that the leases may give rise to only one cause of action. Obviously, this is not and cannot be the law. Where there are continually repeating breaches, a new claim arises after each breach and a new cause of action may be asserted.

For example, in *United Black Firefighters Assoc. v. City of Akron*, 976 Fd.2d 999 (6th Cir., 1992), the court held that a union was not barred by res judicata from raising certain objections to a 1990 racial discrimination case brought by the same Plaintiff who had litigated a nearly identical racial discrimination issue in 1986 and obtained a consent decree. In finding res judicata inapplicable, the Court of Appeals relied on this Court's decision in *Brown v. Felsen*, 442 U.S. 127, 131 (1979), which stated that "under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the **same cause of action**." The *United Black Firefighters'* Court held that "the 1986 consent decree was concerned with remedying alleged racial discrimination prior to 1986" while "the present consent decree is designed to remedy alleged racial discrimination in connection with a 1990 promotional examination which occurred after the 1986

consent decree became effective." *United Black Firefighters, supra*, at 1005. Even though the racial discrimination was potentially of the same sort in both cases, the fact that the new discrimination constituted a new cause of action precluded the application of res judicata.

In this case, a new cause of action accrued each time Shell wrongfully withheld a portion of the royalty payments. *Profit Sharing Trust v. Bell River Joint Venture*, 149 Mich. App. 327, 333; 386 N.W.2d 185 (1986). Accordingly, a new cause of action accrues with each wrongful royalty payment and precludes the application of res judicata in this case. The Court of Appeals' holding that the decision in *Brown v. Shell* bars Petitioners' claim violated their due process rights.

ARGUMENT II

The United States Court of Appeals denied Petitioners due process of law by failing to remand this case to the District Court for consideration of Petitioners' federal and state constitutional claims.

In their complaint, Petitioners contended that if Act 61 is interpreted as imposing a fee obligation on them, then Act 61 is unconstitutional. The District Court determined that the Act 61 privilege fee could not be imposed on Petitioners in the absence of a contractual agreement and held that Shell's deduction of the fee constituted a breach of contract. In light of the District Court's ruling in favor of Petitioners on nonconstitutional issues, the District Court dismissed Petitioners' constitutional claims as moot. (App. J)

Ignoring the importance of the constitutional issues raised by Petitioners, the Court of Appeals construed Act 61 in

a manner violative of both the federal and state constitutions. The Court of Appeals did so without first affording Petitioners the opportunity to pursue their constitutional claims in violation of their right to due process. Accordingly, Petitioners respectfully request that this Court grant their petition for writ of certiorari, reverse the decision of the Court of Appeals and remand this case for consideration of Petitioners' constitutional claims.

The Court of Appeals' total disregard of well established rules of statutory construction deprived Petitioners due process.

The Court of Appeals misinterpreted Act 61 and then used its misinterpretation of Act 61 to defeat Petitioners' claim without affording them the opportunity to challenge the constitutionality of Act 61 as applied.

First, the Court of Appeals' interpretation of Act 61 violated the most fundamental rules of statutory construction and ignored Michigan case law.

> A cardinal principle of statutory construction is that where the Legislature has defined a word or term in an act, a court is bound by that definition. We reiterated this precept in *Earlandson v. Genesee County Employee's Retirement Comm'n*, 337 Mich. 195, 204; 59 N.W.2d 389 (1953).

Carr v. General Motors Corp., 425 Mich. 313; 389 N.W.2d 686 (1986).

Both Act 61 and Act 48 define the term "producer." However, the acts define the term in significantly different ways. Act 61 contained the following definition:

> "Producer" means the operator, whether owner or not, of a well or wells capable of producing oil or gas or both in paying quantities.

Mich. Comp. Laws Ann. § 319.2(h).

Act 48 defines "producer" as follows:

> "Producer" **as used in this act** means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance.

Mich. Comp. Laws Ann. § 205.312(2)(emphasis added).

In its opinion, the Court of Appeals correctly recognized that "only Shell Western is a 'producer' under Act 61," (App. C; p. 30a) However, the court then ruled that the term "producer" as defined in Act 48 must be read into Act 61. (App. C; p. 34a). The Court of Appeals cited no authority for its departure from the well-established rules of statutory construction.

In ignoring the definition of "producer" contained in Act 61 and holding that Act 48's definition of the term controlled, the Court of Appeals disregarded another fundamental rule of statutory construction: When the legislature employs the restrictive phrase, "as used in this Act," the legislature intended the definition to be limited to that particular act. See, *Wrigley Stores, Inc. v. Board of Pharmacy*, 336 Mich. 538; 59 N.W.2d 8 (1953). In dismissing an allegation that a definition of "drug" in one act controlled the meaning of that term in another act, the court held:

> PA 1909, No. 146, above referred to, in setting forth its definition of the word drug, gave that

> definition with the restriction, "the term 'drug' as used in this Act," so that the legislature must be understood to have limited the definition as contained in Act 146 to the things mentioned in that Act and not to have intended that that definition in that Act should be construed or used as explaining the meaning of the word drug as contained in the pharmacy act.

Id. at 590.

The Court of Appeals' decision that Act 48's definition of "producer" should be read into Act 61 ignores two very important facts: (1) Act 61 contains a definition of the term "producer" that is different from the definition contained in Act 48; and (2) Act 48's definition of "producer" express limits the use of that definition to that act only.

On one hand, the Court of Appeals recognizes that "the general thrust of Act 61 is to provide for a supervisor of well to oversee the extraction of oil and gas in Michigan" and that "the fee imposed by Section 22 provides funds for this oversight." (App. C; p. 34a) On the other hand, the court ignores this statutory purpose and interprets Act 61 as imposing liability on royalty owners in disregard of the "fundamental canon of statutory construction that the words of the statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989).

In short, the Court of Appeals decision ignores the most basic principles of statutory construction without providing any authority or reason for doing so. Such a complete departure from established procedure denies Petitioners due process of law.

The Court of Appeals' decision denied Petitioners of due process of law by ignoring relevant case law and legislative history.

In addition to violating well-established rules of statutory construction, the Court of Appeals' construction of Act 61 also ignores other Michigan court pronouncements concerning the interplay between Act 61 and Act 48, as well as the Legislative history of both Act 61 and Act 48. In *Brown v. Shell*, *supra*, the Michigan Court of Appeals specifically referred to the Act 61 fee as a privilege tax separate and distinct from the Act 48 severance tax. The *Brown* Court made direct reference to an opinion of the Michigan Attorney General in which the Attorney General concluded that the payment of Act 48 severance taxes and Act 61 privilege fees were the responsibility of producers of gas and oil, not of the owners of royalty interests. OAG 1963-1963, No. 4160, p. 118 (June 17, 1963). (App. O)

The *Brown* Court reasoned that in response to the Attorney General opinion, in 1965 the Michigan Legislature amended only Act 48 to add a definition of producer that included royalty owners. Before the amendment, the Act 48 tax was levied on "each corporation, association, or person engaged in the business of severing from the soil, oil or gas . . ." *Brown*, *supra*, at 115. The *Brown* Court concluded that the new definition of producer in Act 48 title extended the scope of Act 48 so that owners of royalty interests were also responsible for the Act 48 severance tax. *Id.*, at 116.

In contrast, nothing in the history of Act 61 reflects a similar amendment in response to the Attorney General opinion, nor does there exist any basis for the Court of Appeals' conclusion that the Legislature intended to expand the scope of Act 61 to include royalty owners by incorporating into Act 61 Act 48's definition of "producer." Quite to the contrary, the express language of Act 61 illustrates that Act 61 does not

incorporate the taxing provisions of Act 48. The fee is simply collected by the method set forth in Act 48.

In this case, the Court of Appeals ignored the definition of "producer" contained in Act 61 and instead applied the definition of "producer" contained in Act 48 -- a definition specifically limited in application to Act 48 only. In doing so, the Court of Appeals violated at least three fundamental rules of statutory construction without providing any authority for its departure from those rules. The Court of Appeals also ignored Michigan state court precedent and the legislative history of both Act 48 and Act 61. The Court of Appeals' decision so far departs from the ordinary course of judicial procedure that this Court's intervention is compelled.

The Court of Appeals' decision deprives Petitioners of due process of law by denying them any opportunity to pursue their constitutional claims.

The Court of Appeals' conclusion concerning the meaning and scope of Act 61 renders it unconstitutional in the following respects:

1. When construed to impose financial liability upon royalty owners, Act 61 fails to clearly and plainly state that it is a tax imposed upon royalty owners, and that fact that it does so by reference to another statute violates Mich. Const. 1963, art. 4 § 32, which requires that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax."

2. When construed to impose financial liability on royalty owners, Act 61 fails to make reference in its body or title to any obligation being imposed as a fee or tax upon royalty

owners, and thus, violates the title object clause of Mich. Const. 1963, art. 4, § 24.[2]

3. When construed to impose financial liability upon royalty owners that are not engaged in the business of producing gas and oil, Act 61 violates both Petitioners' federal and state constitutional rights to due process by imposing a fee on royalty owners that is meant to apply only to those in the business of producing gas and oil. U.S. Const Am. 14; Mich. Const. 1963, Art. 1, § 2.[3]

Given the Court of Appeals' reversal of the District Court's decision, remand for consideration of Petitioners' constitutional claims was the only course of action adequate to protect Petitioners' due process rights.

> If the judgment is permitted to stand, deprivation of plaintiff[s'] property is accomplished without [them] ever having had an opportunity to defend against the exaction.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 679 (1930).

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[2] "[A] title is an indispensable part of every statute, and the expression of the subject of the Act must be found, if at all, in the words of the title." *Welsh v. Ohanesian*, 378 Mich. 24, 29; 142 N.W.2d 690 (1966).

[3] "That consistent with the due process clause of the 14th Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt. . ." *Frost v. California R.R. Comm'n.*, 271 U.S. 583, 592 (1926).

CONCLUSION

The Court of Appeals' decision constitutes a denial of Petitioners due process rights on all fronts -- from the Court's decision that res judicata barred Petitioners' claim, to its complete departure from the rules of statutory construction in its interpretation of Act 61, to its failure to remand this matter for consideration of Petitioners' constitutional claims. Throughout its decision, the Court relied on assumptions it made which had no factual support in the record. If the Court of Appeals' decision is allowed to stand, Petitioners will be denied the opportunity to present their constitutional challenges in violation of due process and Shell will have carte blanche authority perpetually to breach its leases with royalty owners. Petitioners respectfully request that a Writ of Certiorari issue, and that this Court summarily dispose of this case pursuant to Sup. Ct. R. 16 by reversing the United States Court of Appeals' decision regarding res judicata, vacate the remainder of that decision and remand this case to the District Court for full consideration of Petitioners' claims.

/s/_____
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APPENDIX A

96-1530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
July 6, 1998
LEONARD GREEN, Clerk

KENNETH R. HILLIARD, ET AL.,)
Plaintiffs-Appellees,)
)
v.)
)
SHELL WESTERN E & P, INC.,)
ET AL.,)
Defendant-Appellant.)
/

ORDER

BEFORE: MERRITT, RYAN, and HILL,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

[1] Hon. James C. Hill, Senior United States Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

original panel members but also to all other active[**] judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

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[2] Judge Nelson recused himself from participation in this ruling.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 96-1530) Trial Court No.) 5:93-CV-21)) Appeal from the
vs.	) United States District) Court for the Western) District of Michigan
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	)))

/

MOTION OF PLAINTIFFS-APPELLEES FOR REHEARING AND FOR REHEARING EN BANC

The Plaintiff-Appellee Class moves this Court for Rehearing in accordance with Rule 40, Federal Rules of Appellate Procedure, and for Rehearing en Banc in accordance with Rule 35, Federal Rules of Appellate Procedure, of this Court's May 22, 1998 Decision and Order relating to this case. As grounds for this Motion, and in support hereof, Plaintiff-Appellees state that this Court erred in (1) making erroneous factual determinations unsupported by the record, (2) finding that the res judicata doctrine applied contrary to fact and law, and (3) determining that Plaintiffs

are subject to the Act 61 fee in the absence of a legal or constitutional bases to do so. In support of this motion, Plaintiffs state as follows:

I. THIS COURT ERRONEOUSLY MADE FACTUAL DETERMINATIONS WHICH WERE NOT SUPPORTED BY THE RECORD

The May 22, 1998 Opinion of this Court contains factual references that are both unsupported by and contradictory to the record. These factual determinations are pivotal to this case and have led this Court to incorrect conclusions. These incorrect and unsupported factual references are as follows.

A. On page 2 of the Opinion, this Court stated that "*The representatives of the current class were previously part of another class which sued Shell Western, claiming that the Act 48 deductions breached the parties' lease.*" This is incorrect and unsupported because: (1) no certified class *ever* existed to consider the Act 48 issue, (2) the Act 48 issue was severed from the other issues in *Brown v. Shell*, (3) the Act 48 issue was conclusively decided *before* the *Brown v. Shell* class was certified to consider the remaining issues in the case, and (4) the Act 48 issue was never part of the *Brown v. Shell* class settlement.

The original *Brown v. Shell* case was filed in 1981 seeking a class action. No class was certified until **1984**. Much happened during the intervening three years. By stipulation of the parties (See Motion, Stipulation and Order attached as Composite Exhibit A), a First Amended

Complaint was filed on **February 6, 1981**. (App[***] 241-6). That pleading only named 13 specific plaintiffs. On **December 16, 1981**, Shell Western filed a Motion for Partial Summary Judgment relating to the First Amended Complaint. (App 253-8). That Motion dealt specifically and exclusively with the Act 48 severance tax issue. The remaining issues were left to be litigated between Shell Western and the thirteen original plaintiffs. The State Circuit Court entered an Order on the Partial Summary Judgment on **April 6, 1982**. (App 273-4). By another Order dated **April 6, 1982**, the Circuit Court severed Count I dealing with the Act 48 severance tax issue. (See for example text of App 188). The Order, specifically relating only to the Act 48 severance tax issue, was then appealed to the Michigan Court of Appeals, which returned its opinion and order in *Brown v. Shell*, 128 Mich App 111, 339 NW2d 709 (1983). On **March 20, 1984**, as part of an agreed settlement with Shell, the thirteen named plaintiffs filed a Second Amended Complaint which did *not* deal in any way with the Act 48 severance tax issue. (App 189-198, see also App 181-187). Thereafter, on **March 29, 1984**, the parties filed a Motion to Approve a Settlement. (App 181-187). That Joint Motion specifically indicated in paragraph 2, entitled "SUBJECT MATTER OF SETTLEMENT," that "[t]he proposed settlement shall have no substantive effect on the [Act 48] severance tax issue". (App 183). The settlement on page 4 demonstrates that the parties agreed to class certification, *but*, by virtue of the remaining terms, the class certification dealt **only** with the remaining issues in the case. Tax issues **were not** then and

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[3] "App" refers to the Joint Appendix previously filed by the parties in this case.

never were any part of the *Brown v. Shell* class issues, and that was by consent of Shell Western. On **May 31, 1984**, the Circuit Court entered a consent Final Judgment on the remaining issues in the case, which, pursuant to the settlement, *excluded* any Act 48 severance tax issue. (App 479-486). Consequently, the Act 48 severance tax issue was never litigated by or made part of the *Brown v. Shell* class. Even the notice to the Class Members expressly excluded the Act 48 severance tax issue. (See Motion to Approve Settlement at ¶ C, p 5, App 181-187). Accordingly, to say that the 864 current class members were part of "*another class which sued Shell Western, claiming that the Act 48* [severance tax] *deductions breached the parties' lease,*" is contrary to the record before this court. The Act 48 severance tax issue only involved thirteen parties, and was fully decided **years** before the *Brown v. Shell* class was ever certified, by consent, to cover the remaining issues.

B. On Page 3 of the Opinion, this Court incorrectly states that "*plaintiffs claim that Shell Western has breached the same leases by deducting the Act 61 fee ...*" The lease forms are the same, but the breaches in the 13 *Brown v. Shell* leases in no way covered the 864 leases here. (See also argument in II.D., infra).

C. On page 5 of the opinion, this Court writes "*Although the fact that Shell Western was deducing for Act 48 taxes is different from the fact that it was also deducting for Act 61 fees, both assessments were deducted from plaintiffs' royalties at the same time and both appeared on the same statement of accounts ...*" This is incorrect. This Court even later recognizes on page 5 that Shell Western does not "*appear to have been entirely forthcoming with the*

information about these deductions ..." The undisputed letters attached to Plaintiffs' complaint demonstrate that Plaintiffs were not aware of the Act 61 deductions and that those deductions were disguised as a tax" and not an Act 61 fee. (App 65-74). Further, the only "statement" that showed an Act 61 charge was an "in-house" report by Shell Western that was not distributed by Shell Western to the royalty owners. A review of the statement provided to the royalty owners (App 66) demonstrates that only a "tax" was withheld, while the in-house report, not sent to the royalty owners, breaks down the various categories and includes specific categories for "severance tax" and "privilege tax." (App 507). The documents demonstrate that this Court's statement indicating that the Act 61 fee "*appeared*" on the royalty owners' statement of accounts is incorrect, and that mistake changes the character of the transaction.

D. On page 5 of the Order, the Court writes "*the plaintiffs have admitted that they discovered during the first case the essential facts relevant to the present case*." The Plaintiffs certainly did not admit this. This was argument by Shell Western. The Honorable Judge Quist quickly dispensed with this argument in his Opinions dated June 13, 1995 and July 20, 1995. (App 500-501,513-516).

In summary, these are four pivotal points that are not supported by the record and frankly, are contradictory to the record. The true facts change the outcome of this case. It is unfair to the litigants to make these "findings" without, at a very minimum, a remand.

II. THIS COURT INCORRECTLY DECIDED THAT RES JUDICATA BARRED PLAINTIFFS' CLAIMS

A. This Court erred when it held that "*the plaintiffs knew or should have known what Shell was doing*" in deciding that Plaintiffs should have litigated the Act 61 issue at the same time as the Act 48 issue. Res judicata is not available to Shell because Shell **agreed** early in the case in *Brown v. Shell* to limit the scope of the court's inquiry to the Act 48 severance tax only. In *Brown v. Shell*, the parties stipulated to an Order granting a Motion to Amend, which Motion provided:

> [J]udicial economy makes advisable the **limiting of issues to be litigated to two**, the propriety of defendant charges imposed upon plaintiffs for certain operations of the Kalkaska gas plant and further, **defendants imposition upon plaintiffs of a portion of the Severance Tax chargeable to individual wells**. (Exhibit A. Emphasis added).

Act 61 *was not* litigated in *Brown v. Shell*, and the parties' stipulation demonstrates that it **could not have been** litigated, by Shell Western's choice and agreement. Therefore, as Judge Quist determined, Shell failed in its burden to meet the requirements of the res judicata defense. In addition, it would be patently unfair, and inconsistent with the res judicata doctrine, to allow Shell to agree to limit the scope of a cause of action and then use that prior, limited cause of action to defeat subsequent, unrelated claims.

B. This Court *found* that "*the plaintiffs knew or should have known what Shell was doing*," which is contrary to the record below. Prior to this lawsuit, Shell deducted the Act 61 fee as part of the "taxes" noted on the statements sent to Plaintiffs. When asked to explain what "taxes" were being withheld (App 65), Shell represented that ***only*** severance taxes were being withheld. (App 67). A severance act is the Act 48 tax. Only after further inquiry did Shell disclose the Act 61 deduction. (App 68-69). The results of Plaintiffs' inquiry precipitated the filing of this law suit. (App 73). Because Shell concealed its deduction of the Act 61 fee, at a minimum, a question of fact exists regarding whether the Act 61 issue could have been litigated in the prior case. Judge Quist specifically addressed this issue and found, in his November 2, 1993, opinion that Shell had not met its burden of proof on this issue. Shell has subsequently failed to file any documentation that could alter this decision.

C. This Court also erred in deciding without discussion that "*[t]he representatives of the current class were previously part of another class which sued Shell Western, claiming that the Act 48 deductions breached the parties' lease,*". No certified class existed with respect to the Act 48 issue and proper class representation was not at issue before Judge Quist. Whether individual plaintiffs properly represented a class in a prior cause of action is a determination that may not be made from simply examining the pleadings and briefs. *Potter v. Wayne County*, 46 Mich App 174; 207 NW2d 448 (1973). Plaintiffs' current claims cannot be barred if their interests were not properly represented in the prior case.

D. This Court also erred in holding that res

judicata applied because "*[t]he plaintiffs already litigated Shell's contractual royalty payment obligations once.*" Judge Ryan has previously concluded that when, as here, different causes of action exist, res judicata cannot apply. In *United Black Firefighters Ass'n v. City of Akron*, 976 F2d 999 (6th Cir., 1992), Judge Ryan concurred with the opinion holding that a union was not barred by res judicata from raising certain objections to a 1990 racial discrimination case brought by the same plaintiffs that had litigated a nearly identical racial discrimination issue in 1986 and obtained a consent decree. In finding that res judicata did not apply, this Court, relying on United States Supreme Court precedent, held that "the 1986 consent decree was concerned with remedying alleged racial discrimination prior to 1986" while "[t]he present consent decree is designed to remedy alleged racial discrimination in connection with a 1990 promotional examination and which occurred after the 1986 consent decree became effective." Id. at 1005. Even though the racial discrimination was potentially the same in both cases, the fact that the new discrimination constituted a new cause of action precluded the application of res judicata. Similarly, here, a new cause of action accrues each time Shell wrongfully withholds a portion of a royalty payment. See *Profit Sharing Trust v. Bell River Joint Venture*, 149 Mich App 327, 333; 386 NW2d 185 (1986). Consistent with precedent from the United States Supreme Court, the Sixth Circuit Court of Appeals, and Judge Ryan's concurrence in United Black Firefighters Ass'n, supra, the fact that a new cause of action accrues with each wrongful royalty payment precludes the application of res judicata.

E. Error requiring this Court to reconsider its opinion is also evident from this Court's reliance on

Brownridge v. Michigan Mutual In Co, 115 Mich App 745; 321 NW2d 798 (1982). In that case, the plaintiff, who was fired, lost her claim of sexual discrimination against her employer, and then was barred from seeking damages for being fired on the alternate theory that she refused to participate in the employer's redlining scheme. The plaintiff's claim was barred because she was seeking redress for the same breach," the fact that she was fired, but alleged two different legal theories. Here, Plaintiffs are not seeking recovery for the same breach. The Act 48 tax is different from the Act 61 fee in that: (1) each provision requires the payment of a different amount, (2) Act 48 levies a tax for reasons that are different from those supporting the Act 61 fee, and (3) the purposes behind the two acts differ. Shell could improperly withhold the Act 48 tax without withholding the Act 61 fee, and vice versa. This is not a case in which Plaintiffs are seeking the same recovery on alternate legal theories. Rather, the 13 original Plaintiffs first sought to stop Shell from wrongfully withholding the Act 48 tax, and now the entire class is seeking to bar Shell from wrongfully withholding the Act 61 fee.

III. THE COURT'S ANALYSIS OF ACT 61 IS NOT BASED ON MICHIGAN LAW

This Court erred in extending the scope of Act 61 by finding that the Act 61 fee is levied in the same manner as the Act 48 fee and, therefore, ordering that a Judgment be entered in favor of Shell. This conclusion is wrong for the following reasons: (1) Plaintiffs' constitutional claims were not addressed by Judge Quist in light of his ruling in favor of Plaintiffs on non-constitutional grounds; thus those issues must still be addressed; (2) the history of the two statutes

demonstrates that Act 61 was not expanded as was Act 48; (3) the express language of Act 61 incorporated Act 48 for purposes of **collection** of the fee only, not for purposes of **levying** the fee; (4) a court may not alter the definition of a term in a statute; (5) Plaintiffs are not "owners" as defined by Act 61 and thus cannot be subject to the Act 61 fee; and (6) this Court's ruling renders Act 61 unconstitutional.

A. This Court erred in applying the Act 48 definition of "producer" to Act 61. In *Brown v. Shell, supra*, the Michigan Court of Appeals specifically referred to the Act 61 fee as a "separate privilege tax." In so doing, the Court made direct reference to an opinion of the Michigan Attorney General in OAG 1963-1964, No. 4160, p. 118 (June 17, 1963), in which the Attorney General concluded that the payment of the Act 48 severance tax and the Act 61 privilege fee were the responsibility of producers of gas and oil, not of the owners of royalty interests. The Attorney General's opinion is key to understanding why Act 61 does not apply to Plaintiffs because in response to the Attorney General's Opinion, the Legislature, in 1965, amended **only** Act 48 to add a definition of "producer" that included royalty owners. Prior to this amendment, the Act 48 tax was levied on "each corporation, association, or person engaged in the business of severing from the soil, oil or gas. . ." *Brown v. Shell, supra* at 115. Thus, the new definition and title extended the scope of Act 48 so that owners of royalty interests were also responsible for the tax. *Brown*, 128 Mich App at 116. **Nothing in the history of Act 61 reflects a similar amendment in response to the Attorney General's Opinion**, nor does any other basis exist for concluding that the Legislature ever intended to expand the scope of Act 61 to include royalty owners. Hence, this Court's conclusion that

the scope of Act 61 included royalty owners, by incorporating Act 48, is not supported by any act of the Legislature. To the contrary, the express language of Act 61 demonstrates that it does **not** incorporated any of the **taxing** provisions of Act 48 The statute provides that a fee is "**levied** upon all oil and gas produced in this state." MCL 319.22(1) (Emphasis added). The only purpose for the reference to Act 48 is for collection of the fee: "The fee shall be **collected** . . ." by reference to Act 48. Id. This method of collection is set forth in §3 of Act 48, and simply provides that the Act 48 tax is withheld and paid by the common carrier/purchaser instead of being paid directly by the producer. The reference to Act 48 was not meant to be used to **levy** the Act 61 fee on those not contemplated within the Act 61 regulatory scheme, but was meant to demonstrate the manner in which the Act 61 fee would be collected. Under Act 61, royalty owners do not "produce" oil and gas, rather "producers" of oil and gas produce oil and gas. See MCL 319.2(g) and (h). Thus, a fee levied on oil and gas **produced** can only be levied on those who **produce** it: the producers. (See argument III.B., infra). The Court properly recognized that "only Shell Western is a "producer" under Act 61". (Op. p8)

B. This Court's application of the definition of "producer" in Act 48 to Act 61 also violates established Michigan rules of statutory construction. While the Court correctly recognized that "only Shell Western is a "producer" under Act 61," the Court ruled without citing legal authority that the term "producer" as used in Act 48 must be read into Act 61. As a result, this Court held that Plaintiff royalty owners are "producers" for the purpose of Section 22 of Act 61 (Opinion Page 11). This holding is directly contrary to Michigan law. The Michigan rule is that "where the

legislature has defined a word or a term in an Act, a court is bound by that definition." *Carr v. General Motors Corp.*, 425 Mich 313; 389 NW 2d 686 (1986). In *W.S.-Butterfield's Theaters v. Department of Revenue*, 353 Mich 35; 91 NW 2d 269 (1958), the Michigan Supreme Court stated that "we need not, indeed must not, search a field for meanings where the Act supplies its own." Michigan's rule is consistent with other states' laws. See 73 Am Jur 2d, Statutes § 226, Page 413, which provides:

> [W]here a statute contains its own definition of a term used therein, the term may not be given the meaning in which it is employed in another statute, although the two may be in *pari materia*.

In Carr, supra, at 318 the Court held that:

> A cardinal principle of statutory construction is that where the Legislature has defined a word or term in an act, a court is bound by that definition. We reiterated this precept in *Earlandson v. Genesee County Employee's Retirement Commission*, 337 Mich 195, 204; 59 NW 2d 389 (1953) quoting 50 Am Jur, §§ 261, 262, pp 253-254):
>
> *It is within the legislative power to define the sense in which words are employed in the statute.*
>
> A statutory definition supersedes the commonly accepted, dictionary, or judicial definition. Where an act passed by the

> legislature embodies a definition it is binding on the courts. (Emphasis added).

Because the Legislature chose not to **levy** the Act 61 fee in the same manner as the Act 48 tax, the Act 61 definition of "producer" must prevail.

C. The Court erroneously assumes that it is proper to take a definition from one statute and impose it upon another by incorporation or inference. In so doing, the Court overlooked the fact that the definition of "producer" in Act 48 specifically provides that it is limited to **that** statute. The statute provides that the term "producer"

> *as used in this Act* means a person who owns or is otherwise entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of gas or oil as of the time of its production or severance. MCL 205.312(2); MSA 7.362(2) (emphasis added).

By using the term "as used in this act," the language is confined solely to Act 48. A similar clause limiting the definition of a word to a particular statute was examined by the Michigan Supreme Court in *Wrigley's Stores Inc. v. Board of Pharmacy*, 336 Mich 583; 59 NW2d 8 (1953). There the Court, in dismissing an allegation that a definition of "drug" in one Act controlled the meaning of that term in another Act held:

> PA 1909, No 146, above referred to, in setting forth its definition of the word drug, gave that definition with the restriction, 'the

> term "drug" *as used in this Act,'* so that the legislature must be understood to have *limited the definition as contained in Act 146 to the things mentioned in that Act* and not to have intended that that definition in that Act should be construed or used as explaining the meaning of the word drug as contained in the pharmacy act. Id. at 590. (emphasis added)

The term "producer," whose definition is limited to Act 48, cannot be expanded to Act 61.

D. This Court incorrectly found Plaintiffs to be "owners" under Act 61. The Court therefore erroneously concluded that Plaintiffs received a benefit under Act 61. The Court properly defined the term "owner" under Act 61 as a person who has the **right to drill and produce** from any pool. (Op 8). The plaintiffs are merely royalty owners who have leased their rights to drill and produce oil or gas from the property to Shell. In Michigan, Plaintiffs have **no** right to drill or produce the oil and gas: "The exclusive right to explore for and reduce oil and gas to possession becomes vested in a lessee under an oil and gas lease immediately upon the execution thereof." *Michigan Consolidated Gas Co. v. Muzeck*, 4 Mich App 502, 507; 145 NW2d 266 (1966).

As discussed by the Michigan Supreme Court in *Mobil Oil Corp. v. Treasury*, 422 Mich 473; 373 NW2d 730 (1985), a decision joined in by Judge Ryan when he was a member of that court:

> Under the terms of the "lease" the operator-lessee is entitled to enter onto the

> surface of the property to explore for oil and gas, to drill wells, to install pumping equipment, and to extract oil or gas from the property. To the extent that it does not interfere with these activities of the lessee, the landowner lessor is entitled to use the surface of the property; *however, he may not extract oil or gas himself or transfer the right to do so to another for the duration of the lease*. *Id*. at 479 (emphasis added).
>
> * * *
>
> The answer is plain. The landowner, lessor, in oil and gas leases of this type, is not involved in production at all, but is merely a passive recipient of income." *Id*. at 498.

Plaintiffs-royalty owners are neither "producers" nor "owners" under Act 61. Thus, the fee levied on "oil and gas produced" in Michigan cannot apply to Plaintiffs. See also *Detroit Hilton Limited Partnership v. Dept't of Treasury*, 422 Mich 422; 373 NW2d 586 (1985), in which Judge Ryan, writing for a unanimous Court, held that a mere lessor of real property is not responsible for a tax imposed on the business of the lessee.

E. The Court of Appeals' conclusion as to the meaning and scope of Act 61 renders it unconstitutional. Further, by directing that judgment be entered without remand for consideration, this Court effectively cut off issues raised at the Trial Court which were considered moot merely because Summary Judgment could be granted on non-

constitutional grounds. (See Order of Trial Court dated November 2, 1993). Under this Court's interpretation, Act 61 is unconstitutional in the following ways:

a. The failure of Act 61 to clearly and plainly state that it is a tax imposed upon royalty owners, and the fact that it does so by reference to another statute, violates the Const. 1963, Art. 4 § 32, which requires that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax."

b. The failure of the title of Act 61 to make reference to any obligation being imposed as a fee or tax upon royalty owners violates the title object clause of Const. 1963, Art. 4 §24.

c. As raised in the Plaintiffs' complaint, imposing the Act 61 fee on royalty owners, when that act is meant to apply to only those in the business of producing gas and oil, is a violation of both Plaintiffs' Michigan and united States due process rights. Const 1963 Art. 1 §2; US Const Am 14. As set forth in III.D, supra, Plaintiffs are not in the business of producing oil simply by being royalty owners. Thus applying this business fee to Plaintiffs violates their due process rights. See, also, *Frost v. Railroad Comm'n*, 271 US 583; 70 Led 1101 (1926); *Ohio Oil Co. v. Wright-State Treasurer*, 386 Ill 206; 53 NE2d 966 (1944).

IV CONCLUSION

This Court should grant Plaintiffs' request for Rehearing, or Rehearing In Banc. This Court improperly made findings of fact contrary to the record below. Res judicata does not apply because Shell agreed that the prior cause of action was limited to only the Act 48 issue, Shell concealed the Act 61 charges, no record exists to support this Court's conclusion that Plaintiffs, as a class, were properly represented in the prior cause of action, and because the Act 61 issue represents a new cause of action, separate and distinct from the Act 48 issue. This Court's ruling on the Act 61 issue is contrary to the Act itself and Michigan law. This Court's ruling renders Act 61 unconstitutional. This Court's ruling does not address Plaintiffs' various constitutional challenges raised below. Plaintiffs request that this Court reverse its Opinion and Order and Affirm the District Court's rulings. At a minimum, sufficient questions of fact and law exist regarding the issues raised by this Court in its Opinion and Order such that this case must be remanded to the District Court for further proceedings.

Dated: June 3, 1998 RHOADES, McKEE, BOER GOODRICH & TITTA

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Motion Rehearing, No. 96-1530 - 6/3/98

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Motion Rehearing, No. 96-1530 - 6/3/98

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the Brief of Plaintiff-Appellee was furnished this 3rd day of June 1998 to Scott A. Storey, 313 S. Washington Square, Lansing, Michigan 48933 by depositing said in the United States mail.

Dated: June 3, 1998 RHOADES, McKEE, BOER GOODRICH & TITTA

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APPENDIX C

NOT RECOMMENDED FOR PUBLICATION

No. 96-1530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 22, 1998
LEONARD GREEN, Clerk

KENNETH R. HILLIARD; GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs-Appellees,	) On Appeal from) the United States) District Court for) the Western) District of Michigan
v.	)
SHELL WESTERN E & P, INC., Defendant-Appellant.	)

BEFORE: MERRITT, RYAN, and HILL,[*] Circuit Judges.

RYAN, Circuit Judge. A word of explanation is in

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[1] The Honorable James C. Hill, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

order concerning the delay in rendering our opinion in this case.

Because the issues brought to us on appeal are exclusively questions of state law, we certified these issues to the Michigan Supreme Court on October 22, 1997, asking that it decide the questions. On February 26, 1998, we received a one-sentence order from the Michigan Court declining 5 to 2 our request to answer the questions certified. No reason for the declination was given. We proceed therefore to resolve these questions of Michigan law in this unpublished opinion since what we say is not precedential.

This is a class action over which the district court exercised supplemental jurisdiction after multiple RICO claims, which were the predicate for federal jurisdiction, were dismissed from the case. The plaintiffs are landowners who contractually allowed defendant Shell Western to operate oil and gas wells on their land. They allege that Shell Western breached the parties' contract by deducting a statutory "privilege fee" from the plaintiffs' royalties. The district court granted summary judgment on the plaintiffs' breach-of-contract claim and awarded damages to the plaintiff class. Shell Western appeals from the district court's Final Order, which also rejected Shell Western's's affirmative defense that res judicata barred the plaintiffs' claim.

We conclude that because the plaintiffs could have brought their claim in a prior contract suit between these parties, res judicata bars the current action. Moreover, we are satisfied that the district court erred in holding that the relevant Michigan statutes support the plaintiffs' claim. Thus, we shall reverse.

I.

FACTUAL BACKGROUND

At the heart of this case are two Michigan statutes–"Act 48," or Mich. Comp. Laws §205.301 et seq., and "Act 61," or Mich. Comp. Laws §319.1 et seq.–which provide for a "tax" and a "fee," respectively, on the production of oil and gas in the state. Shell Western has been deducting a pro rata share of these expenses before paying royalties to the plaintiffs. The representatives of the current class were previously part of another class which sued Shell Western, claiming that the Act 48 deductions breached the parties' lease. In this previous action, the Michigan Court of Appeals upheld summary judgment for Shell, finding that because the royalty owners were "producers" under the statute, they were obligated to pay their pro rata share of the tax. See Brown v. Shell Oil Co., 339 N.W.2d 709 (Mich. Ct. App. 1983).

In the present action, the plaintiffs claim that Shell Western has breached the same leases by deducting the Act 61 fee. Plaintiffs allege that, unlike the Act 48 severance tax, this Act 61 fee must be paid by "operators" of wells, and not the owners of the land or mineral rights. Shell Western maintains that the plaintiffs knew or should have known that the Act 61 fee was being deducted from their royalties at the time they filed the first action, and that, therefore, their failure to raise that issue in the first suit between the parties precludes litigating it in the second. Alternatively, Shell Western contends that Act 61 operates "in the same manner, at the same time, and subject to the provisions of [Act 48]." Therefore, it argues, in light of the Brown v. Shell precedent

which interpreted Act 48, plaintiffs are obligated to pay their pro rata share of the Act 61 fee just as they are obligated to pay part of the Act 48 tax.

The district court rejected both of these arguments, and found instead that Act 61 required payment solely from the operators of oil and gas wells. Thus, the court entered summary judgment for the plaintiffs. This appeal followed.

II.

A.

> The concerns behind the doctrine of res judicata are economy of judicial resources and finality of litigation. The doctrine of res judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining and deciding the subject matter of the litigation. Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. The doctrine of res judicata applies equally to facts and law. The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions.

Jones v. State Farm Mut. Auto. Ins. Co., 509 N.W.2d 829,

834 (Mich. Ct. App. 1993)(emphasis added) (citations omitted).

In 1982, the Michigan Court of Appeals ruled that a woman who lost her suit against her employer for wrongful discharge by reason of sexual discrimination could not later bring another claim that she was wrongfully discharged for her refusal to adopt certain illegal "redlining" practices. See Brownridge v. Michigan Mut. Ins. Co., 321 N.W.2d 798 (Mich. Ct. App. 1982). In dismissing the plaintiff's second claim, the court did not explicitly acknowledge that different facts would be necessary to establish each claim. However, it is obvious that distinctly different evidence would be offered under each theory. For instance, the contested evidence in the second case would address whether the defendant practiced illegal redlining, whether it demanded such practices from its employees, and whether the plaintiff's failure to comply led to her dismissal. None of these facts would have been relevant in determining whether the plaintiff had been dismissed because of her gender. Thus, even though these essential facts would be different in the second case, the court held that both actions arose out of the same discharge from employment and therefore the same "transaction" or "matter in issue." Id. at 799.

Similarly, the plaintiffs' claims here are precluded under the letter as well as the spirit of the res judicata doctrine. The letter of the law requires a common "transaction," or identity of material "facts" or "evidence." Although the fact that Shell Western was deducting for Act 48 taxes is different from the fact that it was also deducting for Act 61 fees, both assessments were deducted from the plaintiffs' royalties at the same time and both appeared on the

same statement of accounts. And, while it is true that evidence regarding the plaintiffs' obligation to pay a pro rata share of the Act 61 fee would not necessarily have been relevant to their obligation to pay the Act 48 severance tax, both would have been equally relevant in proving Shell Western's alleged breach of contract. Surely, a plaintiff who loses on his claim that a car manufacturer is liable for injuries caused by defective brakes cannot then sue under the theory that the steering was also faulty.

The spirit of the law is to resolve multiple claims where doing so would conserve judicial resources. Certainly, this objective would have been better accomplished if the Act 61 claims had been resolved with the Act 48 claims. Although it does not appear that the plaintiffs strategically chose to ignore the Act 61 deductions in order to get a second bite at the apple (nor does Shell Western appear to have been entirely forthcoming with the information about these deductions), nevertheless, the plaintiffs knew or should have known what Shell was doing. The plaintiffs already litigated Shell's contractual royalty-payment obligations once. They were required to include all other royalty-related claims about which they knew or should have known. With reasonable diligence, the plaintiffs should have known about the Act 61 deductions. In fact, the plaintiffs have admitted that they discovered during the first case the essential facts relevant to the present case. Had they brought their Act 61 action earlier, this issue could have been resolved long ago at much less expense. Failing to do so then precludes the plaintiffs from having a second chance now.

Citing no authority, the district court held that res judicata should not apply to class actions. However,

International Typographical Union v. Macomb County, 11 N.W.2d 242, 245-46 (Mich. 1943), demonstrates that unnamed class members may be precluded from relitigating claims brought by the class. Similarly, the U.S. Supreme Court has clearly indicated that res judicata may bar a member of a losing class from later filing suit on the same claim. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985). Courts rely on class representatives and class counsel to adequately protect the rights of class members. We must assume that the class representatives and counsel either made a strategic decision in the first case not to raise the Act 61 issue, or unreasonably failed to discover it. In either case, the failure is imputed to all class members.

B.

After rejecting Shell Western's res judicata defense, the district court went on to hold that Act 61 required the defendant to pay the fee at issue here. Even if we were not satisfied that the claim preclusion aspect of Michigan res judicata law bars the plaintiffs' action, we would conclude that plaintiffs' case must fail on the merits.

Because the parties' contract is silent as to who bears the responsibility for the Act 61 fee, we look to the intent of the Michigan Legislature, evidenced by the language of Acts 48 and 61, in determining who is required to pay. Section 22, the fee-imposing portion of Act 61, provided, at the time relevant to this suit:

> For the purpose of monitoring, surveillance, enforcement and administration of this act, a fee not in excess of 1%, based on the gross

> cash market value is levied upon all oil and gas produced in this state. The fee shall be collected by the revenue division of the department of treasury in the same manner, at the same time and subject to all the provisions of the tax levied by [Act 48.]

Mich. Comp. Laws § 319.22(1) (1987). Act 61 provided no other guidance as to how or from whom the fee was to be collected.

Act 48, referenced above in Act 61, provided that "[t]here is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax." Mich. Comp. Laws § 205.301 (1965) (emphasis added). Additionally, Act 48 required: "Each producer, when requested by the department, shall file [a report showing the amount of oil and gas produced the preceding month and the actual market value thereof] in the form and manner required by the department." Mich. Comp. Laws § 205.302(2). The Act 48 severance tax constituted 2% of the gross cash market value of the total production of the oil or gas during the preceding monthly period" and must be paid by "each producer" at the time he renders each monthly report. Brown, 339 N.W.2d at 712 (quoting Mich. Comp. Laws § 205.303) (emphasis added).

Under Act 48, a "producer" is "a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance." Mich. Comp. Laws § 205.312(2) (emphasis added). Thus, under Act 48, both parties are "producers." Under Act 61, however, a

"producer" is "the operator, whether owner or not, of a well or wells capable of producing oil or gas or both in paying quantities." Mich. Comp. Laws § 319.2(h). Only Shell Western's is a "producer" under Act 61. Act 61 defines an "owner" as "the person who has the right to drill into and produce from any pool, and to appropriate the production either for himself or for himself and another or others." Mich. Comp. Laws § 319.2(g). Obviously, the plaintiffs are owners under Act 61.

The question is, then, whether Act 48, which is incorporated by reference into Act 61's revenue provision, brings with it its own definition of "producer" or whether Act 48 relies, in turn, on the Act 61 definition. Notably, the Act 61 fee section does not mention 'producers'; rather, its fee is levied on "oil and gas produced." Moreover, whereas Act 48 is a revenue-generating statute the purposes of which were served by addressing the obligations of owners of land and operators of wells simultaneously by defining them as one category, the non-revenue purposes of Act 61 require separate categories. For instance, section 319.3 allows "producers" to select six members of the advisory board to the supervisor of wells. "Owners" do not select any members. Similarly, section 319.13 requires the supervisor of wells to "afford the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas in the pool." (Emphasis added.) No such consideration is given to "producers."

When the legislature wanted to ensure that royalty owners and well operators each paid a pro rata share of the Act 48 tax, it clearly defined producer to include such owners and operators and used the defined term "producer" in the

taxing provision. When the legislature wanted to distinguish between "owners" and "producers" for purposes of regulating oil and gas wells, it clearly defined such terms and used them appropriately throughout the regulating statute. However, instead of levying the Act 61 fee which pays for the regulatory scheme on either the "producer" or the "owner," the legislature levied it on "oil and gas produced" and required it to be collected "in the same manner, at the same time, and subject to the provisions of [Act 48]."

The district court read Act 61, section 22, as incorporating all the provisions of the Act 48 taxing statute, except Act 48's definition of "producer." Instead, the court held that Act 61's definition of "producer" should in turn be incorporated into the Act 48 taxing scheme, even though that word is used only in the regulatory provisions of Act 61, and is not referred to in section 22, the revenue provision.

However, the fact that Act 61 contains absolutely no guidance as to the collection of the fee except for the reliance on Act 48 -- which is explicit in its allocation -- indicates that the legislature intended to adopt all the taxing provisions of Act 48. Similarly, section 22 of Act 61 seems to require the adoption of all portions of the Act 48 tax scheme in order to give effect to all its clauses. That is, section 22 states that the fee is to be collected (1) "in the same manner," (2) "at the same time," and (3) "subject to the provisions of [Act 48]." Restated another way: (1) the Act 61 fee should be collected through the same procedures and from the same entities as the Act 48 tax; (2) the fee should be paid monthly along with the severance tax; and (3) the definitions of Act 48 should be applied to the revenue-generating provision of Act 61. It is difficult to read these three clauses any other way and still

give each meaning.

The plaintiffs rely heavily on the argued distinction between a "tax" and a "fee." They claim that the Act 48 tax is equivalent to and in place of property taxes and thus is payable in part by the property owner, while the Act 61 tax is essentially a fee for the privilege of operating a well and is thus payable solely by the operator. The Michigan Court of Appeals, in Bauer v. Department of Treasury, 512 N.W.2d 42, 43 (Mich. Ct. App. 1993), did hold that royalty owners who paid a pro rata share of the severance tax were exempt from personal income tax on those same royalties, in light of Mich. Comp. Laws § 205.315 which states that "[t]he severance tax herein provided for shall be in lieu of all other taxes, state or local, upon . . . the values created."

The plaintiffs argue that, unlike the Act 48 tax, the Act 61 fee is by nature a license, occupation, or privilege fee. Thus, it has no natural connection to the property owners, but rather is directed solely at the party with the license or privilege to extract oil and gas. The court in Brown v. Shell, supra, supported such a distinction in holding that the severance tax was not a business, licensing, privilege, or occupational tax. See Brown, 339 N.W.2d at 713. The negative inference of this holding could be that Act 61 does impose a license, occupation, or privilege fee. However, Act 61 was never discussed in Brown. Additionally, the court of appeals subsequently overruled itself and found that the severance tax is not a property tax, but an excise tax. See Lawnichak v. Department of Treasury, 543 N.W.2d 359, 362 (Mich. Ct. App. 1995).

Moreover, the general thrust of Act 61 is to provide

for a supervisor of wells to oversee the extraction of oil and gas in Michigan. The fee imposed by section 22 provides funds for this oversight, and any excess monies collected in a year offset the appropriation for the next year. Mich. Comp. Laws § 319.22(4). While the plaintiffs and the district court imply that Act 61 is designed exclusively to regulate the conduct of well operators such as Shell Western, the oversight provided by the supervisor of wells includes significant efforts to protect the "correlative" rights and interests of land owners. See Mich. Comp. Laws § 319.13(1), 319.18b.

For instance, section 18b provides a penalty for a "person who abandons a well without properly plugging the well," but "[n]othing herein contained shall be construed as imposing any liability upon the owner of land upon which a well is located, unless he is the owner or part owner of the well." More importantly, section 13 mandates that "[t]he rules or orders of the supervisor shall, so far as it is practicable to do so, afford the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas in the pool." Thus, although the primary purpose of Act 61 is almost certainly to regulate the conduct of oil and gas companies, a significant amount of this regulation appears to protect the rights of landowners. Additionally, it should be noted that in 1987 the legislature deleted from section 22 the word "privilege." If this change was not merely one of clarification, it must mean that the legislature did not intend a mere "privilege" fee.

In light of the above, we hold that the taxing portion of Act 61 incorporates all of the Act 48 taxing mechanism, including the Act 48 definition of "producer." Thus, the plaintiffs are "producers" for purposes of section 22 and are

required to pay a pro rata share of the Act 61 fee. Shell Western has not breached the parties' contract.

III.

Because the plaintiffs are precluded from relitigating this breach of contract claim, and because it is meritless in any event, summary judgment for the plaintiffs is **REVERSED**, and this case is **REMANDED** for entry of judgment for Shell Western. Obviously, this ruling moots Shell Western's remaining assignments of error.

APPENDIX D

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

ORDER
Entered: February 24, 1998

IN RE CERTIFIED QUESTION FROM
THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

KENNETH R. HILLIARD and	) SC: 110862
GREGORY D. STYLES,	) CA-6: 96-1530
Plaintiffs-Appellees,	)
	)
v	)
	)
SHELL WESTERN E & P, INC.,	)
Defendant-Appellant.	)
_____/	

On order of the Court, the questions certified by the United States Court of Appeals for the Sixth Circuit are considered, and the Court respectfully declines the request to answer the certified questions.

Boyle and Kelly, JJ., would answer the certified questions.

H0219

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 24, 1998 /s/_____
Corbin R. Davis

APPENDIX E

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 96-1530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
October 22, 1997
LEONARD GREEN, Clerk

KENNETH R. HILLIARD,)
GREGORY D. STYLES,)
Plaintiffs-Appellees,)
)
v.)
)
SHELL WESTERN E & P, INC.,)
Defendant-Appellant.)
_____/

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF MICHIGAN

BEFORE: MERRITT, RYAN, and HILL,[*] Circuit Judges.

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[1] The Honorable James C. Hill, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

This is a state-law class action originally filed in a Michigan court and in due course removed to the United States District Court for the Western District of Michigan. The basis for removal was an issue of federal law involving claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, which have been dismissed from the case. The district court, in the exercise of its supplemental jurisdiction, entered summary judgment for the plaintiffs on issues of Michigan law and the defendant has appealed to this court.

We are asked on appeal to decide questions that are exclusively issues of state law regarding the proper application of the Michigan common law of res judicata and the interpretation of two Michigan statutes: Act No. 48 of the Public Acts of 1929 as amended, MICH. COMP. LAWS § 205.301 et seq., and Act No. 61 of the Public Acts of 1939 as amended, MICH. COMP. LAWS § 319.1 et seq.

I.

Plaintiffs, Kenneth R. Hilliard and Gregory D. Styles, trustees under a trust agreement, allege on behalf of Michigan property owners that Shell Western E&P, Inc. has breached contracts between the parties which allow Shell Western to extract oil and gas from plaintiffs' land in exchange for a percentage of the proceeds. The breach, according to plaintiffs, arises from Shell Western's deduction of certain expenses before paying the plaintiffs their royalties. Shell Western admits that it has been deducting from plaintiffs' royalties portions of the fee levied under the authority of Act No. 61 and the tax levied under the authority of Act No. 48, but maintains that it is authorized by statute to do so. In

addition, Shell Western contends that plaintiffs could have, and should have, raised this issue in a previous lawsuit, Brown v. Shell Oil Co., 339 N.W.2d 709 (1983), in which plaintiffs contested the deductions made under Act No. 48.

In Brown, representatives of the current class were part of another class which sued Shell Western, claiming that the Act No. 48 deductions breached the parties' leases, which were silent on the deductibility issue. The Michigan Court of Appeals upheld summary judgment for Shell, finding that because the royalty owners were "producers" under Act No. 48 they were obligated to pay their pro rata share of the tax. Id. at 713.

In this case, plaintiffs claim that Shell Western has breached the same leases by deducting the Act No. 61 fee. Plaintiffs allege that unlike the Act No. 48 severance tax, this fee must be paid by "operators" of wells, and not the owners of the land or mineral rights. Shell Western contends that Act No. 61 operates "in the same manner, at the same time, and subject to the same provisions of [Act No. 48]." Therefore, it argues, in light of the Brown precedent, which interpreted Act No. 48, that plaintiffs are obligated to pay their pro rata share of the Act No. 81 fee, just as they are obligated to pay part of the Act No. 48 tax. Additionally, Shell Western notes the great similarity between the two claims, and contends that under Michigan claim-preclusion law, plaintiffs are precluded from raising the issue now when they could have raised it previously.

II.

Resolution of the issues raised in this case may well

have a significant impact on Michigan jurisprudence and upon the public fisc. In our judgment, there is insufficient Michigan decisional law to enable this court to determine how the Supreme Court of Michigan would rule on either of the issues presented. A correct interpretation of the Michigan law of res judicata or claim preclusion has import for Michigan's jurisprudence far beyond this case.

In addition, significant sums of money are involved in the outcome of the Act No. 61 fee issue. The jurisprudential precedent that must necessarily be set here undoubtedly will affect the relative burdens upon landowners and oil and gas companies in Michigan, and necessarily will impact state revenues.

In an instance such as this, where the state law is unclear and the resolution of the issues before the court are so significant, it is preferable, in the interests of comity and a respect for our federalism, that this intermediate federal appellate court yield the decisional ground to the Supreme Court of Michigan for an, authoritative interpretation of the applicable rules of state law.

III.

Therefore, pursuant to the provisions of Michigan Court Rule 7.305(B), the United States Court of Appeals for the Sixth Circuit certifies the following questions to the Supreme Court of Michigan:

1. Whether, under the doctrine of res judicata, a group of property owner lessors, who previously challenged their lessee oil and gas driller's practice of deducting a pro

rata share of Act No. 48 taxes from landowners' royalties, and who knew or should have known that the tenant lessee driller was at the same time deducting a share of the Act No. 61 fee, is precluded from now litigating the Act No. 61 deduction; and

2. Whether the correct interpretation of section 22 of Act No. 61, which imposes a fee on "oil and gas produced," and which incorporates Act No. 48's provision for collecting taxes from "producers" of gas and oil, also requires incorporating Act No. 48's definition of "producer," or whether Act No. 61's definition of "producer" should be inserted into Act No. 48's collection scheme, despite the fact that the term "producers" is not used in section 22 of Act No. 61.

Accordingly, IT IS ORDERED that the foregoing questions be certified to the Supreme Court of Michigan and forwarded to the Clerk of the Supreme Court under Michigan Court Rule 7.305(B).

Nothing in this certification, including the particular phrasing of the foregoing questions, is intended to limit the Supreme Court of Michigan in its consideration of the issues presented. The entire record in this case, together with copies of the briefs of the parties, will be transmitted by the clerk of this court to the Supreme Court of Michigan.

/s/_____
GILBERT S. MERRITT,
Circuit Judge, Presiding

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
March 20, 1996
Deputy Clerk
U.S. District Court
Western Dist. of Michigan

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21) HON. GORDON J.) QUIST
v.	
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

ORDER

The Court has approved the form of judgment attached to this Order. The Clerk shall therefore enter the Final Judgment as attached. Fed. R. Civ. P. 58.

IT IS SO ORDERED.

Dated: MAR 20 1996

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
March 20, 1996
Deputy Clerk
U.S. District Court
Western Dist. of Michigan

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21) HON. GORDON J.) QUIST
v.	
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

FINAL JUDGMENT

This matter having come on to be heard pursuant to diverse Motions, and the Court having entered an Order on November 2, 1993:

1. Granting Plaintiffs' Motion for Partial Summary Judgment on its Breach of Contract Claim;

2. Dismissing Plaintiffs' Constitutional Claims as

moot; and,

The Court having entered an Order on May 4, 1995, dismissing Plaintiffs' RICO Claims; and,

The Court having entered an Order on May 22, 1995, allowing Plaintiffs to withdraw their Claims for Relief, Fraud, and Accounting; and

The Court having entered an Order on December 8, 1993, as amended by Order dated March 28, 1995, certifying as a Class the following:

All persons, firms, concerns, receivers, trustees, personal representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust who have, at any time from and after the 12th day of January, 1987, been entitled to royalty payments from Shell Western E&P, Inc. ("Shell"), attributed to production of oil and gas from Michigan oil or gas wells under leases with Shell and who had, during calendar years 1987 through 1993, $200 or more deducted from such royalties for payment of the regulatory fee imposed pursuant to Act 61 of the Michigan Public Acts of 1939, as amended.

and,

The Court having entered an Order on June 16, 1995, approving Notice to the Class; and,

The Plaintiffs having provided Notice to the Class and having provided appropriate Proof of Service to the Court of such Notice; and,

The Court having received requests of the following persons to not be included in the Class:

1. FREDERICK G. RIEGSEGGER
2. DONAVAN E. ANDERSON
3. TILLISSA G. ANDERSON
4. MARY BELLE COFFMAN
5. CARROL J. FOX
6. MARY ANN FOX
7. NORTH MICHIGAN GAS & OIL
8. MICHIGAN HOLDINGS INC (C/O SANDRA SANDERS)
9. CONOCO INC
10. OMIMEX ENERGY INC
11. GWENDOLYN D. WEBB
12. GARY JEROME MARCENKOWSKI
13. DONNA MARCENKOWSKI
14. KENNETH G. BAXTER
15. JOYCE E. BAXTER
16. MILTON C. MOSIER
17. INEZ H. MOSIER
18. MUSKEGON DEVELOPMENT COMPANY
19. WILLIAM C MYLER
20. MYLER BROTHERS
21. MARION R. STARK
22. SHRINERS HOSPITAL FOR CRIPPLED CHILDREN
23. JONES CO, LTD; DELAFOSSE PROPERTIES, LTD; JHJ EXPLORATION, LTD; AND TUCKER-SCULLY INTERESTS, LTD
24. RONALD J. KOSI BOSKI
25. BYRON P. GALLAGHER
26. ETHEL J. GALLAGHER

27. FIRST PRESBYTERIAN CHURCH OF MAPLE RIDGE (C/O RUTH BRIGGS)
28. RUTH M. LOVE
29. JONES COMPANY, LTD
30. HARROLD M. RUPP
31. NORINE L. RUPP LIFE ESTATE
32. HAROLD W. MOON
33. FLORENCE MARIE MOON
34. DAVID H. JANSMA
35. MILLER BROTHERS: CEMCO; MILLER BROTHERS OIL CORP; MILLER OIL CORP; MILLER ENERGY INC
36. MILDRED GHENT
37. JUANITA BERRYHILL
38. ISABELLE K. MURPHY
39. WILLIAM L. MURPHY
40. GEORIANNA E. MCFAY
41. LOU ANN OLSEN
42. LEE OLSEN
43. JOSEPH S. PRIZY
44. SHARON L. MURPHY
45. ALICE MAE MURPHY
46. BARBARA J. CREG
47. FERRIS B. MURPHY (DECEASED)
48. FARM CREDIT SERVICES OF MICHIGAN'S HEARTLAND, PCA
49. CHARLES R. WISE
50. BARBARA J. WISE
51 THERESA G. SCHIFF
52. WILFRED W. COLE
53. MARY JOE COLE
54. ROBERT G. WILDER
55. JOAN SEABROOK

56. AILEEN P. STOCKING
57. PATRICK PETROLEUM COMPANY
58. LARRY M. BAHR
59. LOIS M. BAHR
60. EDWARD REVARD
61. ADRIAN REYNOLDS
62. DONNA M. SHAY
63. CATHERINE E. ISAACSON
64. ROBERT D. VROMAN
65. MAXINE L. SCHIMKE
66. KENNETH W. SCHIMKE
67. DOROTHY L. MEKARU
68. GARY A. WILLIAMS
69. KATHLEEN M. WILLIAMS
70. HARRY L. MUTCH
71. A. CLAIRE MUTCH c/o MARY W. MUTCH ESTATE
72. GARY MARCENKOWSKI
73. TRAVERSE OIL COMPANY

The Court having noted that the following list contains those class members to whom Notice submitted by first class mail was returned undelivered, and the Court finding that no alternative form of service is reasonable; therefore the following will also be excluded from the class:

1. JACQUEILINE M. GILLARD TRUSTEE UNDER TRUST #100 DATED APRIL 4, 1985
2. SALLY J. LIPPERT, DECEASED
3. GARY P. STEELE
4. LOUIS CHRISTIANSEN
5. JIMBETCO INC.
6. ROBERT L. NUGENT

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that:

1. The Plaintiffs, as a Class, shall recover from Defendant, Shell Western E&P, Inc. ("Shell"), the sum of Seven Hundred Sixty-Six Thousand Six Hundred Twenty-Two Dollars and 06/100 ($766,622.06), which represents the amounts deducted by Shell from royalty payments to members of the class for the Act 61 regulatory fees for the period of January 13, 1987, to January 13, 1993. The Plaintiffs, as a class, shall also recover all Act 61 regulatory fees deducted by Shell between January 14, 1993, and the date of this Final Judgment, and through payment in full.

2. The Plaintiffs, as a Class, shall recover pre-complaint interest from Shell.

3. The Plaintiffs, as a Class, shall recover pre-judgment interest from Shell, from January 14, 1993, up to and including the date of entry of this Final Judgment.

4. All pre-complaint and pre-judgment interest shall be calculated by taking the total amount due as of December 31 of each year, and applying the floating Michigan pre-judgment interest rate described in M.C.L. 600.6013 in effect as of December 31 of said year, applied beginning from January 1 of the following calendar year, and then in the same manner for such full years or portions of full years thereafter until the date that this judgment is entered.[1]

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[1] By way of example only, if the total principal owed as of December 31, 1987, was $100, then the principal and pre-

5. This Final Judgment shall earn post-judgment interest at the rate prescribed in 18 U.S.C. § 1961.

6. All interest due under this Final Judgment shall be paid by Shell to the Common Fund based on the gross recovery to the class. The precise amount of all post-filing damages, pre-complaint interest, pre-judgment interest, and post-judgment interest paid by Shell to the Common Fund and subsequently distributed to the class members shall be determined by this Court when it makes its Order of Distribution to Class members after all appeals are final.

7. This Court grants Plaintiffs' request for declaratory relief. Shell's deduction of the Act 61 fee is a breach of contract; the class members are not liable for any portion of the Act 61 regulatory fee; and Shell is not entitled to deduct any portion of the Act 61 regulatory fee from royalty payments to class members.

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complaint interest would be calculated by taking $100 multiplied by the interest rate of 8.50%, which is the M.C.L. 600.6013 effective interest rate as of December 31, 1987. Interest would begin running on the $100 as of January 1, 1988. The new principal plus interest would then be calculated at the end of each succeeding calendar year beginning December 31, 1988, and the new interest rate would be applied at the beginning of calendar year beginning January 1, 1989, and so forth. The interest calculation would be continued up to the date Final Judgment is entered. The following interest rates shall be used in the calculation of pre-complaint and pre-judgment interest, as of the beginning of these years: 1988 - 8.50%, 1989 - 9.21%, 1990 - 10.105%, 1991 9.535%, 1992 - 8.715%, 1993 - 7.68%, 1994 - 6.313%, 1995 - 7.128%, 1996 - 7.813%, and 1996 - 7.953%.

8. All amounts found to be owed under this Final Judgment shall be paid by Shell into a Common Fund for the benefit of class members. This Court retains jurisdiction to make all necessary Orders relative to the distribution of that Common Fund. The Common Fund shall be maintained by Shell in the form of a segregated account at a financial institution of its choice, and Shell shall provide quarterly balance statements to Plaintiffs' counsel. Shell shall have the option to post sufficient bond to be approved by this Court in lieu of paying the amounts into a Common Fund.

9. This Court retains jurisdiction over this matter to grant such further and proper relief that becomes necessary, including but not limited to the award of attorneys fees and expenses from the Common Fund and the enforcement of the declaratory judgment under 28 U.S.C. § 2202.

Dated: 3/20/96 /s/_____
CLERK, U.S. DISTRICT COURT

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
July 20, 1995
U.S. District Court
Western District of Mich.

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21
vs.	) HON. GORDON J. QUIST
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

OPINION AND ORDER DENYING SHELL'S MOTION FOR RECONSIDERATION

Defendant, Shell Western E & P Inc. (Shell), has filed a Motion for Reconsideration and for Relief From Order of this Court, which Order is dated June 13, 1995. In the Opinion and Order of June 13, 1995, this Court denied Shell's

motion to apply the doctrine of res judicata to bar the named plaintiffs (who are the representatives of the class that this Court has certified) from pursuing this action. Shell claims the named plaintiffs were apprised that the "privilege fee" was being deducted from their royalty checks even if the other class members were not so apprised. Shell says that granting the motion for partial res judicata for the named plaintiffs, only, would not destroy the class nature of this case and that this Court did not pay enough attention to three of the documents that Shell brought to this Court's attention.

As this Court said in its Opinion of June 13, 1995, the first time that Shell raised the point of a limited application of the res judicata argument was after the Court ruled on the general application of res judicata and all substantive matters. Shell was never prevented from raising the issue of limited application of the doctrine in the alterative to the general application, although there are probably good tactical reasons for Shell's not having done so. The point is that by May 12, 1995, this case, one of the oldest on this Court's docket, had been concluded except for some important details regarding class notification. It was at this point that Shell sought, for the first time, to have the class representatives dismissed, thereby depriving the class of their class representatives. New class representatives could possibly be appointed, but this would cause delay.

More importantly, a review of the law and the record does not lead this Court to change its earlier decision that Michigan's "broad rule" does not apply in this case. Michigan's "broad rule" has been defined as follows:

The plea of res judicata applies, except in

> special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged in the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time. Rogers v. Colonial Fed'l Savings & Loan Ass'n, 405 Mich. 607, 616 - 17 (1979) (emphasis in original).

Plaintiffs privilege fee claims before this Court are not simply alternative theories of relief for the same set of operative facts. Unlike Gose v. Monroe Auto Equipment Co., 409 Mich. 147 (1980) and City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1088-91 (6th Cir. 1989), for example, the instant case does not involve a single right to recover for a worker's injury (Gose) or a single transaction which gave rise to contract claims and constitutional claims (City Communications). Rather, the instant case involves entirely different, individual, and ongoing breaches of contract requiring construction of separate state statutes, which breaches occurred both before and after the alleged breaches asserted in state courts were litigated to conclusion or settled. Only the deductibility of the severance tax was litigated to conclusion before the state courts. The litigation now before this Court does not deal with the severance tax. Nor is this Court aware of any document which asserted that the privilege fee issue was settled or was even discussed during the settlement negotiations in the state court matter.

The documents to which Shell refers in its motion now under consideration refer to the severance tax and the "privilege tax." However, Exhibits D and J are documents

which, in this Court's judgment, do not fairly apprise the plaintiffs of the deductions to the extent that the privilege fee was ever before the parties and considered as a claim to be forgiven for all time. The response of Hubert W. Johnson to the question of Mr. Dale A. Rhoades, attorney for plaintiffs in Black v. Shell, likewise is not fair apprisal. This one answer may show that Mr. Rhoades was asleep at the switch in not following through on the answer and thereby expanding on the details of the deduction of the privilege fee. But, it is not unusual in a deposition to listen to answers with one ear because the questioner is often concentrating on establishing a particular point the questioner wishes to make.

It seems to this Court that if Shell had wanted or thought that the issue of the privilege fee should be concluded in the state court litigation, the settlement documents would have clearly so indicated. The settlement covered many specific items, but it did not cover the privilege fee. It does not make sense that Shell, with its bank of outstanding lawyers, would have tried to rely upon the doctrine of res judicata if it thought that the privilege fee issue had been settled. Shell either was absolutely sure that there would be no question of the propriety of the deduction of the privilege fee, purposefully kept a very low profile during the state court litigation so that the plaintiffs would not pursue the deduction, or, like the plaintiffs, simply missed the issue.

In conclusion, the plaintiffs' attorneys' potential knowledge of bits and pieces of information regarding the privilege fee did not give rise to an unreasonable lack of diligence as to forever bar the named plaintiffs from collecting the full royalties under their leases.

For the foregoing reasons, Defendant's Motion For Reconsideration (docket no. 111) is hereby DENIED.

IT IS SO ORDERED

Dated: JUL 20, 1995

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
June 13, 1995
U.S. District Court
Western District of Mich.

KENNETH R. HILLIARD and	)
GREGORY D. STYLES,	) Case No.
Trustee under Trust	) 5:93-CV-21
Agreement dated May 5, 1979,	)
Plaintiffs,	) HON.
	) GORDON J.
vs.	) QUIST
	)
SHELL WESTERN E & P, INC.,	)
a Delaware corporation,	)
Defendant.	)

OPINION AND ORDER DENYING SHELL'S MOTION FOR LIMITED APPLICATION OF RES JUDICATA

The defendant, Shell Western E&P, Inc., has moved for Limited Application of Res Judicata, dismissing the claim of the named plaintiffs (class representatives) in the state court

action of Brown v. Shell Oil Company. This motion will be denied for the following reasons:

1. Granting the motion would destroy the class action nature of this case in that:

(a) This matter was certified as a class action on December 8, 1993;

(b) There would no longer be questions of law or fact common to the class;

(c) The claims of the class representatives would not be typical of the claims or defenses, of the class;

(d) The class representatives would no longer have any incentive to fairly and adequately protect the interests of the class because they would be barred from any recovery in this case.

(e) The issue of application of the doctrine of res judicata solely to the class representatives in Brown v. Shell Oil Company was not raised by Shell until all substantive issues, including the res judicata issue, were decided by this Court.

2. This Court's review of the record in Brown v. Shell Oil Company, reveals that plaintiffs in that case, including plaintiffs' class representatives, were not fairly apprised of the fact that Shell was deducting the Act 61 "privilege fee" from the royalties due the lessors. This lack of fair notice deprived the lessors of the opportunity to bring the

claim for wrongful deduction of the Act 61 privilege fee to the attention of the class members and the state court. Basically, Shell's position is that "because you did not discover the deduction in Brown v. Shell Oil company, we can stick you with your naivete in the instant litigation." This Court is not aware of any case that would support so broad an application of res judicata.

THEREFORE, IT IS ORDERED that Shell's Motion For Limited Application Of Res Judicata (docket no. 105) is DENIED.

Dated: June 13, 1995

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
May 4, 1995
U.S. District Court
Western District of Mich.

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21
vs.	) HON. GORDON J. QUIST
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

OPINION

This case was originally filed in state court and was removed to this Court because Count V tries to allege a claim for violation of subsection 1962(b) of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(b), over which this Court would have jurisdiction

pursuant to 18 U.S.C. § 1964(c). The plaintiffs have been certified as a class of holders of royalty interests as lessors of mineral rights leased to defendant Shell Western E&P, Inc. (Shell). Plaintiffs claim that Shell has wrongfully deducted from their royalty payments a 1% pro rata share of the regulatory fee imposed by Act 61 of the Michigan Public Acts of 1939, as amended. M.C.L.A. 319.1 et seq., M.S.A. 13.139 (Act 61).

Previously, this Court held that the deduction of the Act 61 privilege fee from the royalty payments was a breach of contract. This Court also held, on the basis of the record before it at that time, that the res judicata defense of Shell was not ripe, and was, therefore, denied. This Court also held that, unlike subsection 1962(c) of RICO, subsection 1962(b) does not require a "person" that is separate and distinct from the "enterprise". However, this Court said in its earlier Opinion, "This is not to say that the plaintiff has stated or can prove a RICO violation."

Shell has now filed new motions for summary judgment based upon the doctrine of res judicata and for failure of Count V to state a claim under RICO subsection 1962 (b). Plaintiffs previously moved to strike Shell's collateral estoppel/res judicata defenses. Plaintiffs' motion was denied without prejudice but will be addressed in this Opinion.

The facts upon which this decision rests are more fully set forth in this Court's Opinion of November 2, 1993.

STANDARDS FOR DECISION

The summary judgment standards on the res judicata issue are also set forth in the Opinion of November 2, 1993.

The RICO action may be dismissed if Count V fails to state a claim upon which relief can be granted. Fed. R. Civ. P 12(b)(6). The moving party has the burden of proving that no claim exists. All factual allegations in the complaint must be presumed to be true and reasonable inferences must be made in favor of the non-moving party. 2A James W. Moore, Moore's Federal Practice ¶ 12.07[2.5] (2d ed. 1991). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). Dismissal is also proper if the complaint fails to allege an element necessary for relief or "if an affirmative defense or other bar to relief is apparent from the face of the complaint, such as the official immunity of the defendant . . . ." 2A James W. Moore, Moore's Federal Practice, ¶ 12.07[2.5] (2d ed. 1991).

RES JUDICATA

Shell claims that the decision and settlement of the prior actions of Brown v. Shell, No. 81-885 8-CK in the Grand Traverse County Circuit Court, and Black v. Shell, No. G82-833CA(7)[2], in the Western District of Michigan bar, by the doctrine of res judicata (more recently called, claim preclusion), plaintiff' s current claims for wrongful deduction of the Act 61 privilege fee. Shell, in the first instance, contends that the plaintiffs' suit in Brown "constituted an all

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[2] The Black case was voluntarily dismissed.

encompassing challenge to Shell's calculation of royalty payments and included the claim that inappropriate deductions were made from royalty checks." Shell Res Judicata Brief at 4. This statement is not correct as to the deductions of the Act 61 privilege fee which is the subject of the instant case. The record in Brown does contain a reference to the Act 61 privilege fee in plaintiffs' brief in opposition to Shell's motion to dismiss the severance tax aspect of Brown, but that reference is in the context of explaining the act 48 severance tax. The Michigan Court of Appeals certainly did not rule on the deductibility of the Act 61 privilege fee from the royalties. Brown v. Shell Oil Co., 128 Mich. App. 111 (1983), appeal denied, 424 Mich. 867 (1986), cert. denied, 479 U.S. 824, 107 S. Ct. 97 (1986). The record, taken in the light most favorable to Shell, simply does not support any reasonable conclusion that the parties in Brown, that is Shell and the class members in Brown, or the plaintiffs' attorneys, were considering the Act 61 privilege fee when Brown was being litigated.

To the contrary, the record in Brown supports the position that the deduction of Act 61 privilege fee was not being litigated in Brown. Brown had two aspects - a litigation to conclusion aspect and a settlement aspect. The deductibility by Shell of the Act 48 severance taxes was litigated to conclusion. As stated, there is no court decision on the deductibility of the Act 61 privilege fee. The plaintiffs' other claims against Shell in Brown and Black were settled. The notice to the Brown class members of the terms of the settlement set forth the plaintiffs' claims as follows:

> A. Plaintiffs claim royalty owners are entitled to be paid royalties based upon the value of products

which are manufactured at the Kalkaska Gas Plant and are attributable to their lease. Alternatively, plaintiffs claim that the difference between the total value of those plant products and the value actually credited to the lease is excessive.

B. Plaintiffs claim Shell is not authorized to deduct from royalties costs for dehydration, compression, and sour-gas treatment.

C. Plaintiffs claim Shell is not authorized to withhold from royalty payments amounts necessary to pay pro-rata share of the Michigan Oil and Gas Severance Tax. Plaintiffs' severance tax claims are not affected by the settlement agreement explained below.

D. Plaintiffs claim Shell breached the oil and gas leases and they should be canceled.

On the issue of whether the court decision in Brown resolved the deductibility of the Act 61 privilege fee, it is important that in paragraph C of this notice the parties, which prepared the notice, and the court, which approved of the notice specifically mention the severance tax, which was part of the litigated aspect of the case, and only the severance tax, as not being part of the settlement. Thereby, the parties agreed that the Act 61 privilege fee was not part of the Brown litigation over the deductibility of the Act 48 severance taxes.

Nor is the deductibility of the Act 61 privilege fee part of the settlement. The Act 61 privilege fee is not mentioned in the pleadings, settlement documents or notice to the class members. The specific mention of the items that were settled

without mentioning the Act 61 privilege fee shows that the Act 61 privilege fee was not settled. In fact, plaintiffs' attorneys still contend that they did not even know that the Act 61 privilege fees were being deducted when Brown was settled.

If Shell is to succeed in its res judicata argument, it must do so by application of Michigan's "broad rule" to the facts of this case. As this Court pointed out in its prior opinion, under Michigan law the doctrine of res judicata is used "to bar both claims actually litigated by parties in prior actions and claims that could have been, but were not litigated." City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1089 (6th Cir. 1989). There is no Michigan decision of which either party or the Court is aware which holds that Michigan's broad res judicata rule applies or does not apply in a class action situation.

This Court concludes that Michigan's broad rule should not be applied in the context of a class action such as the action now before this Court. This Court agrees that Michigan's broad rule is generally a good rule for the orderly resolution of disputes between parties. However, where class actions are involved, this Court believes that protection of the class members should override the finality that Michigan's broad rule would afford. Both the state and federal rules for class actions provide a range of protections for the class members. For example, the class representatives must fairly and adequately protect the interests of the class. The class members in Brown were given notice of the nature of the claim being asserted on their behalf. They were also given notice of the terms of the settlement. No notice to the class members informed them that their claims for wrongful

deduction of the Act 61 privilege fee were at issue in the litigation or were being settled. An individual class member could well have objected to the proposed settlement if. the member knew that a claim for wrongful deduction of the Act 61 privilege fee was being settled. If there had been such an objection, perhaps the state circuit judge, in performing his duty to the class, would not have approved the settlement. Certainly, (in hindsight) the class representatives could not have been adequate representatives of the class if they unknowingly disposed of Act 61 privilege fee claims. In short, this Court believes that a class action settlement should not bar all claims that could have been litigated between the parties but only those claims that were actually litigated. Otherwise, the notices, representatives and courts upon which individual class members rightfully rely would be meaningless.

For these reasons, Shell's motion for summary judgment on the grounds of res judicata will be denied. For these same reasons, plaintiffs' motion to strike Shell's collateral estoppel/res judicata affirmative defenses will be granted.

RICO

In order to state a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1964(c), a plaintiff must allege (1) an injury to plaintiff's business or property as a result of (2) defendant's violation of one or more provisions of 18 U.S.C. § 1962. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495, 105 S. Ct. 3275, 3284 (1985). Section 1962 has four subsections - § 1962 (a)- (d). 18 U, S.C. § 1962 (a), prohibits any person

from using investment income derived from a pattern of racketeering activity in any interstate enterprise. 18 U.S.C. § 1962(b), the subsection upon which plaintiffs are relying in the instant case, states as follows:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect interstate of foreign commerce.

18 U.S.C. § 1962 (c), makes it unlawful, for "any person employed by or associated with" an interstate "enterprise" to conduct the affairs of the enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(d), makes it unlawful to conspire to violate the previous subsections of 1962. As "chapter headings," § 1962(a) may be called the "investment" section; § 1962 (b) may be called the "acquisition or control" section; § 1962(c) may be called the "conducting" section; and § 1962(d) may be called the "conspiracy" section.

Because the plaintiffs rely upon § 1962(b) in an attempt to state a RICO claim in this case, this Court will analyze the pleading elements of that particular subsection. This Court believes that one of the clearest descriptions of the requirements of S 1962(b) is found in Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993):

> In order to recover under this section, a plaintiff must show injury from the defendant's acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts. "Such an injury may

> be shown, for example, where the owner of an enterprise infiltrated by the defendant as a result of racketeering activities is injured by the defendant's acquisition or control of his enterprise." In addition, the plaintiff must establish that the interest or control of the RICO enterprise by the person is as a result of racketeering. It is not enough for the plaintiff merely to show that a person engaged in racketeering has an otherwise legitimate interest in an enterprise. Rather, it must be established firmly that there is a nexus between the interest and the alleged racketeering activities.

4 F.3d at 1190 (Citations omitted) (emphasis added). In Lighting Lube, the United States Court of Appeals for the Third Circuit affirmed the district court's dismissal of the § 1962(b) claim because the plaintiff failed to allege how the "acquisition of interest" and "control" of the "enterprise by defendant injured plaintiff:

> As stated above, a well-pled complaint under section 1962(b), just as with section 1962(a), requires the assertion of an injury independent from that caused by the pattern of racketeering. Here, Lightning Lube alleges in terms of a section 1962(b) injury that the employees of Witco are engaged in a pattern of racketeering. RICO Case Statement at 73. Such an allegation clearly is insufficient because it merely parrots the same injury that section 1962 (c) is meant to remedy and fails to explain what additional injury resulted from the person's interest or control of the enterprise.

Id. at 1191. The classic example of a § 1962(b) injury is where the owner of a legitimate business is injured by infiltration of the business by racketeering activity such as loan sharking or extortion. F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc., Nos. 92-3900, 1994 WL 594592, (D.N.J. Oct. 14, 1994). Several other cases describe the independent injury requirement of § 1962(b). E.g., Danielsen v. Burnside-Ott Aviation Training Center Inc., 941 F.2d 1220, 1231 (D.C. Cir. 1991).; Banks v. Wolk, 918 F.2d 418 (3rd Cir. 1990); Greenburg v. Tomlin, 816 F. Supp. 1039 (E.D. Pa. 1993).

In this particular case, the plaintiffs allege that Shell engaged in a series of predicate acts of mail fraud by mailing royalty checks and other documents to plaintiffs without ever disclosing to plaintiffs that defendants were deducting the Act 61 privilege fee. Thus, plaintiffs do not allege that Shell's mail fraud caused Shell to gain or maintain control of an enterprise to plaintiffs' injury. If plaintiffs had made such allegations, they would not make sense. For example, as stated in Brown v. Siegel, No. 94-1829, 1995 WL 66860, at *4 (E.D. Pa. Feb. 13, 1995):

> [I]t is also counter intuitive to assert that an enterprise . . . could gain or maintain control of itself through a pattern of racketeering activity.

Plaintiffs simply claim that the allegedly fraudulent scheme itself caused them injury. In fact, at oral argument, plaintiffs conceded that they have not alleged an injury arising from acquiring or maintaining control which is separate and distinct from the alleged predicate acts. They point out,

however, that RICO must be liberally construed. Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970); Sedima, 473 U.S. at 498, 105 S. Ct. at 3286. Plaintiffs then argue that because the predicate acts are mail fraud and Congress did not create a private remedy for mail fraud, this Court should imply that RICO created a private remedy for mail fraud.

As defendant points out, there are adequate remedies for fraud in state common law. Furthermore, there is a significant difference between construing a statute liberally and legislating from the bench. As the Supreme Court said in Reves v. Ernst & Young, __ U.S. __, 113 S. Ct. 1163, 1172 (1993), the liberal construction provision of RICO

> is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation.

If Congress had wished to create a private remedy for mail fraud, it could have done so. The RICO statute, however, is not intended to create federal, private remedies for everything that Congress has made a federal crime. Rather, § 1964(c) of RICO only provides a private right of action against those who commit any of the activities prohibited in § 1962.

Plaintiffs have not stated a claim under 18 U.S.C. § 1964(c). Therefore, defendant's motion to dismiss Count V of the Complaint will be granted, and plaintiffs' RICO claim will be dismissed.

A separate Order consistent with this Opinion will be entered.

Dated: May 4, 1995

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
May 4, 1995
U.S. District Court
Western Dist. of Mich.

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21) HON. GORDON J. QUIST
vs.	
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

ORDER

In accordance with Opinion issued on this date,

IT IS HEREBY ORDERED that plaintiffs' Motion to strike affirmative defenses of collateral estoppel/res judicata (docket no. 59) is GRANTED.

IT IS FURTHER ORDERED that defendant's Motion for summary judgment on the grounds of res judicata (docket no. 74) is DENIED.

IT IS FURTHER ORDERED that defendant's Motion for partial summary judgment to dismiss count V of the complaint (docket no. 75) is GRANTED as to the RICO claim and plaintiffs' RIC0 claim is DISMISSED.

IT IS FURTHER ORDERED that defendant's motion to dismiss de minimis claims (docket no. 76) is now moot pursuant to the Order docketed as number 91.

Dated: May 4, 1995

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
November 2, 1993
U.S. DISTRICT COURT
WESTERN DIST OF MICH
BY/s/_____

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21) HON. GORDON J.) QUIST
v.	
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

ORDER

In accordance with the Opinion issued on this date,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment on its breach of contract claim (docket #13) is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for dismissal or summary judgment (docket #12) is GRANTED IN PART AND DENIED IN PART. On the claims of breach of contract, fraud, and RICO, defendant's motion is DENIED. On plaintiffs' accounting claim, defendant's unopposed summary judgment motion is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' constitutional claim is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that plaintiffs submit a supplemental brief on class certification no later, than November 22, 1993.

Dated: November 2 1993

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
November 2, 1993
U.S. DISTRICT COURT
WESTERN DIST OF MICH
BY/s/_____

KENNETH R. HILLIARD and GREGORY D. STYLES, Trustee under Trust Agreement dated May 5, 1979, Plaintiffs,	) Case No. 5:93-CV-21) HON. GORDON J. QUIST
v.	
SHELL WESTERN E & P, INC., a Delaware corporation, Defendant.	

OPINION

Plaintiffs are holders of royalty interests as lessors of mineral rights in oil wells leased to defendant Shell Western E&P, Inc. (Shell). They claim that Shell has wrongfully deducted from their royalty payments a 1% pro rata share of the regulatory fee imposed under the Michigan Supervisor of Wells Act, Act 61 of the Michigan Public Acts of 1939, as amended, M.C.L.A. 319.1 et seq., M.S.A. 13.139 (Act 61). Shell acknowledges that it has deducted the fee, but denies

that it has acted wrongfully.

Defendant' s Position

Shell moved for summary judgment on all counts of plaintiffs' Complaint. With respect to Count I, which alleges that Shell has breached its contracts by deducting the fee, Shell argues that it acted within its rights on the authority of Brown v. Shell Oil Co., 128 Mich. App. 111, 339 N.W.2d 709 (1983), appeal denied, 424 Mich. 867 (1986), cert. denied, 479 U.S. 824, 107 S. Ct. 97 (1986). Brown v. Shell held that royalty payments were subject to severance taxes on oil and gas assessed pursuant to another Michigan statute, Act 48 of the Michigan Public Acts of 1929 as amended, M.C.L.A. 205.301-205.315, M.S.A. 7.351-7.365 (Act 48). Shell also alleges that Count I is barred by res judicata because plaintiffs' claim includes the same parties and a claim arising out of the same circumstances as the first case, which claim could have been raised in the earlier case.

On Count II, which requests that the Court declare Act 61 unconstitutional if it is read to require payment by lessors, Shell maintains that the issue is not ripe for constitutional adjudication because it is pled as alternative relief. Shell also seeks to dismiss Count II on the grounds that plaintiffs have sued the wrong party and must bring the constitutional claim against the taxing body and not against Shell.

In Count III, plaintiffs claim that Shell's repeated deduction of the Act 61 fee under the guise of a "severance tax" constituted fraud. Shell argues that judgment should be entered against plaintiffs on the fraud claim because there has been no material misrepresentation and no intent to deceive. It also maintains that this claim should be dismissed because plaintiffs

failed to plead sufficient facts to show a specific intent to deceive and failed to plead reliance or damages as a result of reliance.

Count IV requests an accounting. Shell argues that plaintiff has not pled sufficient facts to justify the equitable remedy of an accounting and that the availability of discovery makes an accounting unnecessary.

With respect to Count V, a RICO claim, Shell argues that plaintiffs have failed to state a claim for mail fraud for the same reasons they failed to state a general claim for fraud. Shell also maintains that plaintiffs have failed to allege damages to business or property as a result of the alleged fraud. In a supplemental motion, Shell seeks dismissal on the grounds that plaintiffs failed to allege the existence of a "person" separate and distinct from an "enterprise" as required by 18 U.S.C. S 1962(b) and failed to allege the elements of mail fraud with sufficient particularity.

Plaintiffs' Position

Plaintiffs moved for summary judgment only on Count I, on the issue of the legality of deducting the Act 61 fee from their royalty payments. They argue that the payment is a regulatory fee which Shell is not authorized to deduct in the absence of lease language permitting such a deduction.

In response to Shell's motion, plaintiffs assert that their claim is not blocked by res judicata because Brown v. Shell, supra, addressed a different type of fee or tax and thus dealt with a different issue. Plaintiffs maintain that the constitutional challenge in Count II is valid because a reading in favor of Shell would violate the Michigan Constitution. On Counts III

and V, the fraud and RICO counts, plaintiffs argue that there are questions of fact that bar summary judgment. They do not disagree with defendant that the equitable relief of an accounting requested in Count IV is unnecessary in this instance.

DISCUSSION

Standard for Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. The rule requires that the disputed facts be material. Material facts are facts which are defined by substantive law and are necessary to apply the law. A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The rule also requires the dispute to be genuine. A dispute is genuine if a reasonable jury could return judgment for the nonmoving party. Id. This standard requires the non-moving party to present more than a scintilla of evidence to defeat the motion. The summary judgment standard mirrors the standard for a directed verdict. The only difference between the two is procedural. Summary judgment is made based on documentary evidence before trial, and directed verdict is made based on evidence submitted at trial. 477 U.S. at 250-51, 106 S. Ct. at 2511.

A moving party who does not have the burden of proof at trial may properly support a motion for summary judgment by showing the court that there is no evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S.

317, 324-25, 106 S. Ct. 2548, 2553-54 (1986). If the motion is so supported, the party opposing the motion must then demonstrate with "concrete evidence" that there is a genuine issue of material fact for trial. Id.; Frank v. D'Ambrosi, Nos. 91-3529, 91-3385, 91-3529, _ F.3d _ "(6th Cir. September 22, 1993) 1993 WL 366352, *4. The court must draw all inferences in a light most favorable to the non-moving party, but the court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992) (quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

Standard for Dismissal

An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The moving party has the burden of proving that no claim exists. All factual allegations in the complaint must be presumed to be true and reasonable inferences must be made in favor of the non-moving party. 2A James W. Moore, Moore's Federal Practice, ¶ 12.0712.5] (2d ed. 1991). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). Dismissal is also proper if the complaint fails to allege an element necessary for relief or "if an affirmative defense or other bar to relief is apparent from the face of the complaint, such as the official immunity of the defendant . . . " 2A James W. Moore, Moore's Federal practice, ¶ 12.0712.5] (2d ed. 1991).

Statutory Interpretation

The fee statute at issue in this litigation, Act 61 of the Michigan Public Acts of 1939, as amended, provides as follows:

> **319.22. Fee for monitoring, surveillance, enforcement, and administration of act**
>
> Sec. 22. (1) For the purposes of monitoring, surveillance, and administration of this act, a fee not in excess of 1%, based upon the gross cash market value is levied upon oil and gas produced in this state. The fee shall be collected by the revenue division of the department of treasury in the same manner, at the same time, and subject to the provisions of the tax levied by Act No. 48 of the Public Acts of 1929, being sections 205.301 to 205.317 of the Michigan Compiled Laws.

M.C.L.A. 319.22, M.S.A. 13.139(22).

Act 48, to which Act 61 refers, provides:

> **205.301. Severance tax on oil or gas**
>
> Sec. 1. There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax.

M.C.L.A. 205.301, M.S.A. 7.351.

In both instances, payment is collected from producers, but there is a marked difference in how "producer" is defined. Act 48 defines "producer" as "a person who owns, or is entitled, to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance." M.C.L.A. 205.312, M.S.A. 7.362. In contrast, Act 61 defines "producer" as "the operator, whether owner or not, of a well or wells capable of producing oil or gas or both in paying quantities." M.C.L.A. 319.2(h), M.S.A. 13.139(2)(h).

The Michigan Attorney General analyzed both Acts in 1963. At that time, the Act 61 heading still referred to a "privilege tax" rather than a "fee" and the definition of "producer" in Act 48 had not yet been amended to include those holding a royalty interest. Addressing the question of whether the State of Michigan was liable for payment of a pro rata share of the Act 61 fee and the Act 48 tax, the Michigan Attorney General ruled that the state was not liable because, as a lessor, it was not a "producer" and because imposition of a tax on the state requires positive legislative action. O.A.G. 1963-1964 No. 4160 (June 17, 1963).

After the Attorney General issued his opinion, the Michigan legislature amended the definition of "producer" to include lessor in Act 48 and exempted the state from the tax. The Michigan Court of Appeals subsequently analyzed Act 48, as amended, in Brown v. Shell Oil Co., 128 Mich. App. 111, 339 N.W.2d 709 (1983), appeal denied, 424 Mich. 867 (1986), cert. denied, 479 U.S. 824, 107 S. Ct. 97 (1986), a case brought by holders of royalty interests as lessors of mineral rights in oil wells leased to Shell Oil Company. The Michigan Court of Appeals held that it was legitimate for

Shell to assess a pro rata share of the Act 48 severance tax against the lessors because the amended statute included them within the definition of producers. The court distinguished between a gross production tax, such as Act 48, which is levied in place of property tax, and a license, privilege, or occupation tax, and explained that "because the severance tax is in lieu of other related property taxes, it is assessable against royalty holders as well as lessees who are actually engaged in the business of severing the oil or gas from the soil." 128 Mich. App. at 119, 339 N.W.2d at 713.

Plaintiffs urge this Court to follow the Attorney General's Opinion and hold that it is unlawful to pass along the Act 61 fee absent a contractual provision. An Attorney General Opinion is not a binding interpretation of law that this Court must follow. Traverse City School District v. Attorney General, 384 Mich. 390, 185 N.W.2d 9, 17 (1971). Moreover, the Attorney General's Opinion rested on the general exemption of state property from taxation absent positive legislation. Thus, his analysis that a pro rata share should not be assessed because the state, as lessor, was not a producer can be characterized as dicta.

Shell argues that judgment should be entered in its favor on the basis of the Brown v. Shell, decision, which held that Act 48 taxes could be assessed against the lessors. Shell notes that the Act 61 fee is to "be collected by the revenue division of the department of treasury in the same manner, at the same time, and subject to the provisions of the tax levied by Act No. 48 of the Public Acts of 1929." In its first brief, it argues that the tax is levied on "producers" and that plaintiffs must be considered producers pursuant to Act 48 and Brown v. Shell. The Act 61 definition of producers

differs from the Act 48 definition, however, and does not include lessors. It defines producers as well operators. M.C.L.A. 319.2 (h), M.S.A. 13.139(2) (h). Plaintiffs, as lessors, are not operators in connection with the production of oil and gas. Mobil Oil Corp. v. Dep't of Treasury, 121 Mich. App. 293, 328 N.W.2d 367 (1982), aff'd, 422 Mich. 473, 373 N.W.2d 730 (1985). The Act 61 reference to Act 48 cannot be read to somehow amend Act 61's definition of producers. Thus, Shell's argument that the Act 61 assessments it has made against the lessors are required by statute fails.

Shell also argues that the Act 61 fee should be assessed against lessors because it is levied on "oil and gas produced" and a share of the oil and gas belongs to plaintiffs under the leases, which provide for payment in kind or at market value.[1] Shell also argues that market value or "proceeds" that

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[1] The royalty payment provision of the leases attached to the Complaint as Exhibits 1 and 2 state:

4. The lessee shall pay lessor, as royalty, one-eighth of the proceeds from the sale of the gas, as such, produced from gas wells on leased premises, and where not sold shall pay Fifty Dollars ($50.00) per annum as royalty from each such well, and such well shall be held to be a producing well under paragraph numbered two hereof. The lessor to have gas free of charge from any gas well on the leased premises for stoves and inside lights in the principal dwelling house on said land by making his own connections with, the well, the use of said gas to be at the lessor's sole risk and expense. The lessee shall pay to lessor for gas produced from any oil well and used by the lessee for the manufacture of gasoline or any other product, as royalty, one-eighth of the market value of such gas at the mouth of the well. If said gas is sold by the lessee, then as royalty one-eighth of the proceeds of the sale thereof.

plaintiffs are paid under the lease are after-tax proceeds. While this conclusory statement is valid for the Act 48 severance tax pursuant to Brown v. Shell, the distinction the Brown court made between taxes imposed in lieu of property taxes and license or privilege fees blocks its application to Act 61 fees.

Act 61 imposes a regulatory fee rather than a tax. The purpose of the Act is to regulate wells for the prevention of waste. M.C.L.A. 319.1, M.S.A. 13.139(1). Section 22, which imposes the fee, states that it is "[f]or the purpose of monitoring, surveillance, enforcement and administration of this act." M.C.L.A. 319.22, M.S.A. 13.139(22). Expenditure of the monies collected is limited to that purpose.[2] In contrast, Act 48 provides: "The severance tax herein provided for shall be in lieu of all other taxes, state or local, upon the oil or gas, the property rights attached thereto

---

[2] Act 61, section 22, provides:

(3) The proceeds of the fee provided for in this section shall be credited to tho general fund and appropriated by the legislature toward the cost of monitoring, surveillance, enforcement, and administration of this act.

(4) An unexpended fee collected during the current or any previous fiscal year, or unexpended appropriation, shall be carried over and deducted from the following year's appropriation in determining an amount to be certified by the director of the department of management and budget to the department of treasury for computing the annual fee provided for in this act.

M.C.L.A. 319.22, M.S.A. 13.139(22).

or inherent therein, or the values created thereby; upon all leases or the rights to develop and operate any lands in this state for oil or gas, the values created thereby and the property rights attached to or inherent therein." M.C.L.A. 205.315, M.S.A. 7.365.

As the Brown v. Shell court suggested by drawing a distinction between severance and privilege taxes and holding that the severance tax was assessable against royalty holders "because the tax is in lieu of other related property taxes," it is inappropriate to assess a regulatory fee like that assessed under Act 61 against the lessor, absent an agreement in the lease that the lessor will pay a share of the fee.

Defendant admits that the leases attached to the Complaint as Exhibits 1 and 2 are copies of leases held by plaintiffs Styles and Hilliard. The provision of those leases regarding payments, which is quoted in footnote 1, provides that lessors will be paid a percentage of the gross proceeds of the gas and oil sold. There is no provision allowing a deduction for a payment that is not the responsibility of the lessors. Thus, with respect to the leases cited in the Complaint, Shell's deduction of the Act 61 fee is a breach of contract.

For the reasons stated above, plaintiffs' motion for partial summary judgment is granted and Shell's motion as to Count I is denied. In light of the Court's decision on Count I, plaintiffs' constitutional claim, Count II, is moot. Defendant's res judicata argument must, however, be addressed because it has the potential of requiring dismissal of the contract claim prior to reaching judgment on the merits.

Res Judicata

The res judicata issue is whether Brown v. Shell bars portions of this action. Under Michigan law, the doctrine of res judicata is used "to bar both claims actually litigated by parties in prior actions and claims that could have been, but were not, litigated." City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1089 (6th Cir. 1989) (citing Gose v. Monroe Auto Equip. Co., 409 Mich. 147, 162-63, 294 N.W.2d 165, 167 (1980)). In City Communications, plaintiff's First Amendment claim was barred on the grounds that plaintiff had been afforded the opportunity to amend its complaint to add constitutional claims in a previous action and had failed to do so. 888 F.2d at 1088-91.

In response to Shell's allegation that plaintiffs' contract claim is barred by res judicata, plaintiffs argue only that their claims are not barred because the instant claims differ from the claims raised in Brown v. Shell. Plaintiffs do not dispute that the parties are the same. In addition, plaintiffs make no assertion that the claims could not have been brought as a part of Brown v. Shell. On the other hand, Shell has provided no evidence that plaintiffs were afforded a full opportunity to bring their claims regarding Act 61. In the instant complaint, plaintiffs allege that they did not know of the additional deduction until 1989. Thus, it appears that plaintiffs were not aware, at the time they brought the Brown v. Shell action, that the tax deduction Shell was taking from their royalties included the Act 61 fee in addition to the Act 48 severance tax. Even if plaintiffs had or could have became aware of the dual nature of the deduction during the pendency of Brown v. Shell, that case was determined on summary judgment and there is no evidence that plaintiffs would have been afforded

a chance to amend their complaint to include the Act 61 claims.

On the basis of the current record, the res judicata claim is denied. It does not appear that the Act 61 claims were ripe for adjudication or that plaintiffs had the opportunity to bring, them before the court in the Brown v. Shell litigation.

RICO AND FRAUD

Fraud Claim

Shell argues that Count V, the RICO claim, should be dismissed because plaintiffs have not pled the elements of mail fraud with sufficient particularity. It also argues that the fraud claim, Count III, should be dismissed or that summary judgment should be granted because plaintiffs have offered no evidentiary support for their fraud claim. The elements of actionable fraud under Michigan law are as follows:

> The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

Hi-Way Motor Co. v. International Harvester Co., 398 Mich. 330, 336, 247 N.W.2d 813, 816 (1976) (quoted in

Schwartz v. Electronic Data Systems, Inc., 913 F.2d 279, 285 (6th Cir. 1990)).

In the Complaint, plaintiffs allege that since at least 1983, Shell made it a practice to withhold Act 61 regulatory fees from plaintiffs' royalty payments and to conceal the withholding by identifying it as a "tax." Plaintiffs also allege that Shell knew the regulatory fee was not an obligation of plaintiffs and was not an authorized withholding. In addition, plaintiffs allege that Shell used the mails to transmit the check stub advices and other data that disguised the Act 61 regulatory fee deduction as a tax and attach examples of the documents to their Complaint. These allegations are sufficient to state a cause of action in fraud, including mail fraud. "[A] mailing that is incident to an essential part of the scheme" satisfies the mailing element of the mail fraud offense. Schmuck v. United States, 489 U.S. 705, 712, 109 S. Ct. 1443, 1448 (1989) (citation omitted).

Shell also argues that the facts do not support plaintiffs' fraud claim. It maintains that it did not engage in misrepresentation or intentional deception by deducting the Act 61 fee as a tax, but, instead, used the language used in the Attorney General's Opinion and the term originally used in the statute, which described the Act 61 fee as a "privilege tax." Shell attached to its summary judgment motion examples of instances when the State of Michigan referred to the Act 61 fee as a tax, but does not attach an affidavit linking these documents with any action Shell took or failed to take.

Plaintiffs likewise refer in their summary judgment briefs to documents attached to pleading but do not include affidavits. Their response to Shell's motion for summary

judgment refers to the letters attached to plaintiffs' Complaint, which document the inquiry counsel made in 1989. (See Complaint, Exhibits 3, 4, 5, 6). Defendant, in its answer to the Complaint, did not deny the genuineness or authenticity of the letters but instead responded that the documents speak for themselves. These letters show that the Act 61 fee was withheld as a "tax" and that plaintiffs were informed of that fact in 1989. On the basis of plaintiffs' response to defendant's summary judgment motion and the documents they cite, it appears that there are questions of fact regarding whether there were intentional misrepresentations and reliance. Shell thus is not entitled to judgment on the fraud claim or on the RICO claim on the grounds that there is no fraud.

Shell also seeks to defeat the RICO claim by arguing that plaintiffs have failed to allege damages to business or property as a result of the alleged fraud. It claims that plaintiffs "must allege a separate and traceable injury 'stemming directly from the Defendants' alleged use or investment of their [allegedly] illegally obtained income in the [RICO] enterprise.'" Defendant's Motion for Judgment on the Pleadings at 7 (quoting Arioli v. Prudential-Bache Securities, Inc., 811 F. Supp. 303 (E.D. Mich. 1993)). The rule stated in Arioli pertains, however, only to RICO claims based on 18 U.S.C. § 1962(a). In this instance, plaintiffs' claims are based on 18 U.S.C. § 1962(b). Plaintiffs allege as damages that, as a result of the fraudulent deduction, they were "wrongfully deprived of substantial funds." Complaint, ¶ 83. This pleading is sufficient to state damages to business or property, since an injury under RICO need not be "separate from the harm from the predicate acts." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495, 105 S. Ct. 3275, 3284 (1985).

During oral argument on the contract construction issue, I raised the issue of whether Count V properly alleged a RICO violation because it did not allege the "person" - "enterprise" distinction that is required by 18 U.S.C. S 1962. The parties have now briefed the point.

As the Court of Appeals for the Fifth Circuit has explained:

[I]n plain English, the subsections [of Section 1962 of the RICO statute] state:

> (a) a person who has received income from a pattern of racketeering cannot invest that income in an enterprise.
>
> (b) a person cannot acquire or maintain an interest in an enterprise through a pattern of racketeering.
>
> (c) a person who is employed by or associated with an enterprise cannot conduct the enterprise's affairs through a pattern of racketeering.
>
> (d) a person cannot conspire to violate subsections (a), (b), or (c).
>
> Thus, RICO claims under all four subsections necessitate: 1) a person who engages in 2) a Pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise.

In re Burzynski, 989 F.2d 733, 741 (5th Cir. 1993) (citation omitted) (emphasis in original).

A RICO "person" includes any individual or entity capable of holding an interest in property. 18 U.S.C. § 1961(3). A RICO "enterprise" includes a legal entity and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C. § 1961(4).

Most of the litigation under Section 1962 arises out of subsection (c). In order to state a claim under subsection (c) the plaintiff must describe a "person" that is separate and distinct from the "enterprise" being used by the "person." See, e.g., Palmer v. Nationwide Mut. Ins. Co., 945 F.2d 1371, 1373 (6th Cir. 1991); Guzowski v. Hartman, 969 F.2d 211, 215-16 (6th Cir. 1992), cert denied, 113 S. Ct. 978 (1993)The terms "employed by" and "associated with" contemplate a person distinct from the enterprise. See, e.g., Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1489 (6th Cir. 1989). The "enterprise" is not vicariously liable under subsection (c) because such vicarious liability would violate the distinctness requirement. Davis v. Mutual Life Ins.Co. of New York, F.3d No. 90/3560/3561/3587/3878/3879/3881, (6th Cir. September 21, 1993) 1993 WL 370537.

The narrow issue presented by defendant's current motion is whether the "person" and "enterprise" must be distinct under subsection (b), since Count V of the Complaint alleges that Shell's activities violate 18 U.S.C. § 1962(b). In order to state a claim under subsection 1962(b), the plaintiff must allege two basic things: (1) the defendant acquired or maintained an interest in an alleged enterprise through a pattern of racketeering activity; and (2) the plaintiff suffered injury to business or property as a result of that acquisition or maintenance.

The weight of authority supports the plaintiff's contention that, in contrast to subsection 1962(c), the "person" and "enterprise" need not be distinct for purposes of subsection 1962(b). See, In re Burzynski, 989 F.2d 733, 743 (5th Cir. 1993); Busby v. Crown Supply, Inc., 896 F.2d 833, 841-42 (4th Cir. 1990); Landry v. Air Line Pilots Ass'n Intel, AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990), cert. denied, 498 U.S. 895, 111 S. Ct. 244 (1990); Shearin v. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989); Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 529 (9th Cir. 1987); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1361 (3d Cir. 1987); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1307 (7th Cir. 1987), cert. denied, 492 U.S. 917, 109 Si Ct. 3241 (1989); Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1398 (9th Cir. 1986). As stated in Landry:

> In contrast to the language of subsection (c) which "requires a relationship between the 'person' and the 'enterprise,' subsection [...] (b) require[s] only the use of an 'enterprise' by a 'person.'" Thus the RICO person and the enterprise need not be distinct for a person to be held liable under subsection (b). A finding of vicarious liability on the part of an enterprise which derived benefit from its representative's wrongful acts is also consistent with this view.

901 F.2d at 425 (citation omitted) (emphasis in original).

A corporation may be liable under Section 1962(b) if it actually benefits from racketeering income as distinguished from being a mere target or passive instrument of a

racketeering scheme. As stated in Schreiber:

> Under either section 1962(a) or (b), however, the corporation necessarily must be the direct or indirect beneficiary of the pattern of racketeering activity to be both the "person" and the "enterprise."

806 F.2d at 1398.

There are district court cases to the contrary, including a case from this district. In re Tucker Freight Lines, Inc., 789 F. Supp. 884 (W.D. Mich. 1991) (Miles, J.). It does not appear that any Court of Appeals has held that the "person" and "enterprise" must be distinct under subsection 1962(b). Nor does there appear to be any Sixth Circuit case on the point.

I have decided to follow the weight of authority and to deny without prejudice defendant's motion to dismiss the Complaint for failure to allege a "person" distinct from the "enterprise."[3] This is not to say that the plaintiff has stated or can prove a RICO violation. I am simply holding that the Complaint should not be dismissed on the grounds discussed in this Opinion.

Class Certification

---

[3] The motion is denied "without prejudice" because the Sixth Circuit may hold that under subsection 1962(b) the "person" and "enterprise" must be distinct.

Plaintiffs originally brought this case in the Circuit Court for the County of Grand Traverse as a class action. After Shell removed the case to federal court, both parties filed motions regarding class certification. Plaintiffs request that the Court defer action on class certification until after it has decided the motions for summary judgment. Shell requests early determination of class certification. In its brief, Shell contends that plaintiffs have not properly defined a class nor justified prosecution of this case as a class action. Shell has not, however, supported its objections or even specified them with any particularity.

Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs define the class as:

> all persons, firms, concerns, receivers, trustees, personal representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust who have, at any time, been entitled to royalty payments from Shell, attributed to production of oil and gas from Michigan wells under leases with Shell which

> contain no provision expressly or implicitly authorizing Shell to make any deductions from royalties for taxes or fees imposed upon Shell by the State of Michigan.

Complaint, ¶ 24.

The class, as plaintiffs define it, may meet all of these criteria. Plaintiffs' definition of the class requires, however, some refinement to address the problems discussed below.

The first problem is the lack of a time limit on the class. The time should be limited by the applicable statutes of limitations. The second problem is that the definition is somewhat amorphous as to the lease language that would trigger inclusion in the suit. It may be that there is little variation in leases and that the language can be specifically identified. If not, perhaps typical language can be cited. Thirdly, the number of persons in the class must be assessed after the definition is made more specific.

CONCLUSION

For the reasons stated above, plaintiffs' motion for summary judgment on its breach of contract claim is GRANTED. Shell's motion to dismiss or for summary judgment on the claims of breach of contract, fraud, and RICO are DENIED. Shell's unopposed summary judgment motion on plaintiffs' accounting claim is GRANTED. Plaintiffs' constitutional claim is DISMISSED AS MOOT. As to class certification, plaintiffs should submit a supplemental brief addressing the issues raised in this Opinion no later than November 22, 1993. Defendant may submit a response within

fourteen (14) days after service of the brief. An Order consistent with this Opinion will be entered.

Dated: November 2, 1993

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX K

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

CASE NO. 93-10714-CK

A TRUE COPY
VIRGINIA A. WATSON
Grand Traverse County Clerk
January 13, 1993
By Deputy County Clerk

KENNETH R. HILLIARD and)
GREGORY D. STYLES, Trustee)
under Trust Agreement dated May 5, 1979,)
Plaintiffs,)
)
v.)
)
SHELL WESTERN E & P, INC.,)
Defendant.)
_____/

Philip R. Rosi (P31915)
John W. Tilley (P43302)
Co-Counsel for Plaintiffs
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Traverse City, MI 49685-1826
Phone: (616) 946-0044

Complaint - No. 93-10714-CK, 1/13/93

Dale W. Rhoades (P19386)
Kurt D. Hassberger (P29125)
Rhoades, McKee, Boer, Goodrich & Titta
Co-Counsel for Plaintiffs
611 Waters Building
Grand Rapids, MI 49503
Phone: (616) 235-3500

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

COMPLAINT WITH JURY DEMAND

Plaintiffs, on behalf of themselves and all others similarly situated, complain of the Defendant, and state as follows:

COMMON ALLEGATIONS

1. This action seeks (1) monetary damages grounded on breach of contract, misrepresentation, and fraud based on the concealed deduction by Defendant Shell Western E & P, Inc.'s (hereinafter "Shell") from royalty interest payments it has made to Plaintiffs, illegally passing along a charge [hereinafter, "regulatory fee"] imposed upon Defendant under the Michigan Supervisor of Wells Act, PA 1939, No. 61 ["Act 61"], MCL 319.1, *et seq.*, and (2) treble damages under 18 USC 1961(1)(B) [RICO] based on Shell's use of the United States mail in perpetrating this conduct.

JURISDICTION

2. At all times mentioned or material to the claims asserted herein, Plaintiff Kenneth R. Hilliard has been a resident of the County of Manistee, State of Michigan.

3. At all times mentioned or material to the claims asserted herein, Plaintiff Gregory D. Styles has been a resident of the County of Otsego, State of Michigan.

4. Defendant Shell is a Delaware corporation with its principal place of business in Houston, Texas, its mailing address being P.O. Box 576, Houston, Texas 77001; that it is and was at the time of the events alleged in this Complaint doing business in the State of Michigan, more particularly, but not exclusively, in the counties of Mason, Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego, Cheboygan, Montmorency and Presque Isle; and that it maintains as a business address within the State of Michigan, Grandview Plaza Building, Traverse City, in the County of Grand Traverse, Michigan 49685.

5. Jurisdiction over Plaintiffs' RICO claims is conferred upon the Supremacy Clause of the United States Constitution. (US Const art VI)

6. The amount in controversy, as to each named plaintiff, exceeds the sum of Ten Thousand Dollars ($10,000.00).

FACTUAL BACKGROUND

7. Shell approved for use a specific lease form designated LB-88-68 Michigan.

8. Plaintiff Kenneth R. Hilliard (Hilliard) is owner of interests in minerals underlying various premises in the County of Manistee in the State of Michigan.

9. On April 10, 1968, Shell, through its agent, J.L. Orr, leased the interests of Hilliard using form LB-88-68 Michigan. Copies of that lease and assignment are annexed hereto as Exhibit "1."

10. Plaintiff Gregory D. Styles, as Trustee under a Trust Agreement, dated May 11, 1979, and doing business as Stangor Land Company, owns mineral interests in the County of Otsego in the State of Michigan.

11. On April 10, 1968, Shell, through its agent, W.B. Phillips, leased certain interests of Earl E. Styles and Effie T. Styles using lease form LB-88-68 Michigan. Those interests were subsequently conveyed to Plaintiff Gregory D. Styles, Trustee, doing business as Stangor Land Company. Copies of that lease and the assignment to Shell, together with related conveyances and trust agreements are annexed hereto as Exhibit "2".

12. Both said leases provide for the payment to Plaintiffs Hilliard and Styles as Trustee, doing business as Stangor Land Co., of royalty payments based on the one-eighth (1/8) of the market price of oil produced from the premises and one-eighth (1/8) of the proceeds from the sale of gas produced from gas wells on the premises.

13. The LB-88-68 Michigan lease contains no provision expressly or implicitly authorizing Shell to make any deduction from royalties for taxes or fees imposed upon

Shell by the State of Michigan.

14. At all times mentioned or material to the claims asserted herein, Shell has owned and/or operated one or more wells producing oil and gas from Plaintiff's premises covered by the lease identified above.

CLASS ACTION ALLEGATIONS

15. Plaintiffs adopt by reference paragraphs 1 through 14 above.

16. Plaintiffs and members of Plaintiff Class are owners of mineral interests underlying various premises in the State of Michigan.

17. Shell is the owner of leasehold interests in minerals underlying diverse properties in which Plaintiffs and members of Plaintiff Class own mineral interests.

18. Shell executed a lease with Plaintiffs and members of Plaintiff Class for the exploration and production of oil and gas from the premises in which they and members of Plaintiff Class own mineral interests.

19. On information and belief, all such leases are in the form "LB-88-68 Michigan," as in Exhibit "1," or on other lease forms, which contain no provision expressly or implicitly authorizing Shell to make any deduction from royalties for taxes or fees imposed on Shell by the State of Michigan.

20. The interests owned by Plaintiffs and members

of Plaintiff Class under the leases is that of a passive non-operating lessor: a royalty interest.

21. The interest of Shell under the leases is that of an active lessee's working interest.

22. The leases confer upon Shell the sole and exclusive right to explore for and produce oil and gas from the leased premises, free from the possession, control and interference of Plaintiffs and members of Plaintiff Class.

23. Shell, either alone or with other so-called working interest owners, has drilled, owns and operates wells producing oil and/or gas from property in which Plaintiffs and members of Plaintiff Class hold lessor-royalty interests.

24. The class, to wit: all persons, firms, concerns, receivers, trustees, personal representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust who have, at any time, been entitled to royalty payments from Shell, attributed to production of oil and gas from Michigan wells under leases with Shell which contain no provision expressly or implicitly authorizing Shell to make any deductions from royalties for taxes or fees imposed upon Shell by the State of Michigan is so numerous that joinder of all members of the class is impractical.

25. There are questions of law or fact addressed hereinafter common to the class.

26. The claims of the representative parties set forth hereinafter are typical of the claims of the class.

27. The representative parties fairly and adequately protect the interests of the class.

28. The prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

29. The prosecution of separate actions by individual members of the class would create the risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjuciation or substantially impair or impede their ability to protect their interests.

30. The Defendant has acted and/or refused to act on grounds generally applicable to the entire class.

31. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjuciation of the controversy.

COUNT I

BREACH OF CONTRACT

32. Plaintiffs adopt by reference paragraphs 1 through 31 above.

33. Shell is an owner and/or producer of wells producing oil and gas from the properties in which Plaintiffs and members of Plaintiff Class own mineral interests.

34. The Michigan Supervisor of Wells Act, PA 1939, No. 61, MCL 319.1, *et seq.*, hereafter referred to as Act 61 established rules and regulations to prevent producers from operating in a manner which would result in the waste of oil and gas.

35. As owner/producer of wells producing oil or gas, Shell is required to pay the State of Michigan a regulatory fee assessed by Section 22 of Act 61, MCL 319.22.

36. Section 22 of Act 61 expressly states that the regulatory fee is imposed "For the purpose of monitoring, surveillance, enforcement and administration of this act . . ." MCL 319.22.

37. The Michigan Attorney General in OAG No. 4160, June 17, 1963, concluded that as a matter of Michigan law, the Act 61 regulatory fee is not the obligation of holders of royalty interest in oil and gas production.

38. Shell is charged with notice of OAG No. 4160 since its publication.

39. Since at least April 3, 1983, the date of issuance of the decision of the Michigan Court of Appeals in *Brown v Shell*, 128 Mich App 111, Shell had actual knowledge of OAG No. 4160 referred to therein.

40. Act 61 contains no provision authorizing an owner/producer to withhold the regulatory fee from royalty payments to Plaintiffs and members of Plaintiff Class.

41. Plaintiff's lease, on form "LB-88-68 Michigan," contains no provision authorizing the deduction of the Act 61 regulatory fee from royalty payments.

42. Lease form "LB-88-68 Michigan" is clear and unambiguous.

43. On information and belief, other lease forms that Shell executed with other members of Plaintiff Class are equally clear and unambiguous and contain no provision authorizing the deduction of the regulatory fee from royalty payments.

44. Since at least 1983 and, on information and belief, for some time prior thereto, Shell has made it a practice of withholding a portion of the Act 61 regulatory fee from royalty payments to its Michigan lessors.

45. Monthly, Shell deducts a portion of the Act 61 regulatory fee from royalty payments to Plaintiffs and members of Plaintiff Class.

46. Shell enriches itself by retaining the portion of the Act 61 regulatory fee it withholds from royalty payments to Plaintiffs and members of Plaintiff Class.

47. In making monthly royalty payments to Plaintiffs and members of Plaintiff Class, Shell includes an accounting of the amount it deducts from royalty payments for

Michigan taxes.

48. The monthly accountings identify all deductions as "tax."

49. In making annual accounting to Plaintiffs and members of Plaintiff Class, for tax purposes by IRS Substitute 1099 form, Shell has reported the total of the monthly tax deductions as "severance tax."

50. Michigan's severance tax is levied pursuant to The Severance Tax Act, MCL 205.301 *et seq.*, MSA 7.351, *et seq.*

51. The amount Shell reports to royalty owners as deductions for the severance tax exceeds the sums allowed by tax rates in the Severance Tax Act.

52. By an exchange of correspondence dated June 15, 1989, through July 27, 1989, (Exhibits "3", "4," "5", and "6") Shell disclosed to counsel for Plaintiffs that it was deducting the regulatory fee, including it as an element of the "severance tax."

53. In an exchange of correspondence, including a demand that Shell cease deducting the regulatory fee from royalties by including it as an element of the severance tax, Shell claimed it was legally entitled to continue its practice in part because it is "in accord with the custom and practice in the industry these many years" (Exhibits "7", "8", and "9").

54. Prior to obtaining the above-referenced leases Shell, its agents or employees, failed to advise Plaintiffs, their

predecessors in title, or members of Plaintiff Class that any portion of the Act 61 regulatory fee would be deducted from royalty payments.

55. Shell, its agents or employees, failed to inform Plaintiffs, their predecessors in title or members of the Plaintiff Class, at the time the leases were executed that any portion of the Act 61 regulatory fee would be deducted from royalty payments.

56. Shell knew, or should have known that the severance tax and regulatory fee are inherently distinct.

57. Shell knew, or should have known that the severance tax is imposed under the legislature's taxing power, whereas the Act 61 regulatory fee is imposed under its police power.

58. At all relevant times, Shell knew that whereas the severance tax is imposed under PA 1929, No. 48, MCL 205.301, *et seq.*, the regulatory fee is imposed under PA 1939, No. 61, MCL 319.1, *et seq.*, two separate and distinct statutes.

59. Shell has continued its practice of deducting the regulatory fee in its computation of royalties, without disclosing that deduction to Plaintiffs or to members of Plaintiff Class.

60. Shell's deduction of the regulatory fee from royalty payments to Plaintiffs and members of the Plaintiff Class constitutes continuous breaches of contract.

61. As a result of the breaches of contract by Shell, Plaintiffs and members of the Plaintiff Class have been substantially damaged in sums in excess of $10,000.00, having received less from Shell in royalty payments than that to which each is entitled.

62. Shell's conduct as set forth in Count I was so willful and wanton as to demonstrate a reckless disregard of the rights of Plaintiffs and members of the Plaintiff Class.

COUNT II

DECLARATION OF UNCONSTITUTIONALITY

63. Plaintiffs adopt by reference paragraphs 1 through 62 above.

64. To any extent that Shell's passing on of the regulatory fee may be found to be authorized by any statute, administrative rule, governmental opinion or policy, such authorization would violate the federal and Michigan constitutions as follows:

(1) It would violate the "Title-Object" clause of the Michigan Constitution, Mich Const 1963, art 4, § 24, since the title of Act 61 gives no indication that royalty holders would be so liable for the regulatory fee.

(2) It would violate Plaintiffs' due process rights under both the Michigan and Federal Constitutions by including within a regulated class persons who are not in fact within that class; specifically, including by

legislative fiat, royalty holders within the class of oil and gas producers, solely for the purposes of assessing liability for the regulatory fee upon them. Mich Const 1963, art 1, §§ 2 and 17; art 9, § 3; US Const, Amend. 14.

65. To any extent that Shell's passing on of the regulatory fee may be found authorized by statute, rule, or governmental opinion or policy, through an interpretation that likens the regulatory fee to any tax, such as the severance tax imposed under the Severance Tax Act, MCL 205.301, *et seq.*, such authorization would violate provisions of the Michigan constitution, in addition to those in ¶ 62 (1) and (2) above, as follows:

(1) It would violate the distinct statement of tax requirement in the Michigan Constitution. Mich Const 1963, art 4, § 32.

(2) It is without a valid state purpose, its sole effect and purpose being to shift a portion of the burden of the regulatory fee to royalty holders, alleviating part of the burden upon oil and gas producers, with no new revenue for the State.

(3) To the extent that the regulatory fee is found to be a *property* tax, it would violate the uniformity of property taxation clause of the Michigan Constitution in failing to "provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50 percent; and for a system of equalization of assessments." Const

1963, art 9, § 3.

(4) To the extent that the regulatory fee is found to be a tax of any nature it would violate the title-object clause of the Michigan Constitution art 4, § 24, as the title of Act 61 makes no mention of a "tax" and gives no suggestion of the imposition of same on any property in the state.

COUNT III

ACTION FOR FRAUD

66. Plaintiffs adopt by reference paragraphs 1 through 65 above.

67. Shell's conduct in repeatedly deducting the privilege fee from royalties, when its leases with Plaintiffs do not authorize such deductions and while actual and constructive notice that the State Attorney General had concluded that holders of royalty interests have not obligation to pay the fee, disguising such deductions as "severance tax," constitutes willful material and substantial misrepresentations made with the conscious intent to deceptively deprive Plaintiffs and enrich Shell, i.e., fraud.

68. As a result of Shell's fraudulent conduct, Plaintiffs and members of Plaintiff Class have been substantially damaged, having received less from Shell in royalty payments than that to which each is entitled.

COUNT IV

ACTION FOR ACCOUNTING

69. Plaintiffs adopt by reference paragraphs 1 through 68 above.

70. Shell has served notice through correspondence with Plaintiff's counsel (see Exhibits "7", "8" and "9") that it will continue to make wrongful deductions of the regulatory fee from Plaintiffs' royalties until an order of this Court as requested herein.

71. Plaintiffs are entitled to be advised of all deductions made from their royalties based on the act 61 regulatory fee.

72. Plaintiffs have no adequate remedy at law.

COUNT V

VIOLATION OF RICO

73. Plaintiffs adopt by reference paragraphs 1 through 72 above.

74. Shell used the United States mail in violation of 18 USC 1341.

75. Shell used the United States mail in disguising the Act 61 regulatory fee deduction as an element of its deduction for Michigan's severance tax.

76. Specifically, Shell used the United States mail in submitting monthly check stub advices and supporting data

to Plaintiffs and members of the Plaintiff Class which made and continue to make no disclosure that Defendant reduces the royalty payments by an amount withhold for the Act 61 regulatory fee. Examples of such check stub advices to Plaintiffs are included as Exhibit "10" and are outlined as follows:

Gregory D. Styles d/b/a Stangor Land Company: check stub 1-21-83; check stub 10-26-92

Kenneth R. Hilliard: check stub 11-19-82; 1991 Check Stub Detail Summary

77. Specifically, Shell used the United States Mail in submitting annual Internal Revenue Service Substitute 1099 forms to Plaintiffs and members of the Plaintiff Class to falsely and deceptively conceal the Act 61 regulatory fee deduction, including it as an element of the deduction for the severance tax. See attached 1099 forms for Plaintiffs Gregory D. Styles doing business as Stangor Land Company and Kenneth R. Hilliard, Exhibit "11".

78. Specifically, Shell concealed the Act 61 regulatory fee deduction knowing that such deduction was unauthorized by contract or by statute.

79. Specifically, Shell made such deductions, concealing their nature, to wrongfully enrich itself and deprive and defraud Plaintiffs and members of Plaintiff Class of funds rightfully due them.

80. Shell perpetuated this fraud by providing the misinformation to the Internal Revenue Service and to

Plaintiffs and Plaintiff Class by using Substitute Form 1099, using the United States Mail.

81. Specifically, Shell made repeated willful use of the United States mail with the specific intent to mislead and misinform Plaintiffs and members of the Plaintiff Class about the true nature of the deduction, and to profit thereby, a clear violation of 18 USC 1341.

82. Shell's practice of defrauding Plaintiffs and members of the Plaintiff Class making monthly use of the United States mail in repeated violation of 18 USC 1341 constitutes a pattern of racketeering activity as defined in Title 18 USC 1961(1)(B) all in violation of Title 18 USC 1962(B).

83. By reason of Shell's practice of defrauding Plaintiffs and members of Plaintiff Class with a pattern of racketeering in violation of Title 18 USC 1961, *et seq*, Plaintiffs and members of Plaintiff Class were purposefully and wrongfully deprived of substantial funds properly and legally due to them as royalties for oil and gas produced from their lands and interests.

RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court:

A. As soon as is practicable after the commencement of this action brought as a class action, determine by order whether it is to be so maintained.

B. Enter an order declaring that:

(1) Plaintiffs and members of the Plaintiff Class are not liable for any portion of the Act 61 regulatory fee.

(2) Shell is not entitled to deduct any portion of the Michigan regulatory fee paid by Shell from royalty payments to be paid to the Plaintiffs or members of the Plaintiff Class pursuant to its oil and gas leases.

C. Enter a judgment declaring that in the event Shell's actions of passing on the regulatory fee is authorized by statute, administrative rule, governmental opinion or policy, any such authorization violates the federal and/or Michigan constitutions.

D. Pursuant to Title 18 USC 1964(a), issue a preliminary injunction during the pendency of these proceedings and a permanent injunction at the conclusion enjoining and restraining Shell, its agents, employees, and representatives from deducting from royalty payments due to Plaintiffs or Plaintiff Class any sum or sums attributable to the Act 61 regulatory fee.

E. Order Shell to render true and proper accounting to Plaintiffs of all moneys attributable to the regulatory fee which it had deducted from Plaintiffs' royalties, which

accounting should include the amount of regulatory fees deducted from any and all royalty payments paid to each and every plaintiff and each and every member of the Plaintiff Class and the date that each regulatory fee deduction was made from royalty payments.

F. Enter a judgment in favor of Plaintiffs and members of the Plaintiff Class and against the Defendant adjudging Defendant to have breached its contracts with Plaintiffs and Plaintiff Class, awarding damages for such breach in the cumulative sum of all regulatory fees deducted by Shell from royalty payments paid to Plaintiffs and members of the Plaintiff Class, together with interest at legal rates from and after the date of the payment of each royalty payment from which regulatory fees were deducted.

G. Enter a judgment in favor of Plaintiffs and members of the Plaintiff Class and against the Defendant adjuding Defendant to have fraudulently deprived Plaintiffs and members of Plaintiff Class, awarding as compensatory damages the cumulative sum of all regulatory fees deducted by Shell from royalty payments paid to Plaintiffs and members of the Plaintiff Class, together with exemplary damages as the Court deems fit and proper, and interest at legal rates from and after the date of the payment of each such royalty payment from

which regulatory fees were deducted.

H. Enter a judgment in favor of the Plaintiffs and members of the Plaintiff Class and against Defendant Shell adjudging Defendant to have violated Title 18 USC 1341 and Title 18 USC 1961 *et seq* awarding Plaintiffs three-fold the cumulative sum of all Act 61 regulatory fees deducted by Shell from royalty payments paid to Plaintiffs and members of the Plaintiff Class, and accrued interest, together with costs of suit and reasonable attorney fees as mandated by Title 18 USC 1964(c).

I. Grant Plaintiffs and members of the Plaintiff Class such other and further relief as shall be agreeable to equity and good conscience together with costs, interest, and attorney fees.

JURY DEMAND

Plaintiffs hereby demand a jury trial.

Respectfully submitted,

Dated: January 12, 1993

By:/s/_____
Philip R. Rosi (P31915)
Co-counsel for Plaintiffs
161 E. Front Street,
P.O. Box 1826
Traverse City, MI 49685-1826
Telephone 616/946-0044

Dated: January 12, 1993

By:/s/_____
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** Publisher's note: Exhibits to this Complaint are reproduced in Appendix P.

APPENDIX L

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, CATHERINE D. BROWN,)
KENT ROSENBERG, ARLENE ROSENBERG,)
VICTOR SCHULER, ELIZABETH SCHULER,)
DONALD E. WOOD, ELLEN L. WOOD,)
EARL HILLIARD, MARGARET HILLIARD,)
JEROME A. RAY, KAREN M. RAY,)
and KENNETH R. HILLIARD)
Plaintiffs,)
)
v.)
)
SHELL OIL COMPANY, a Delaware corporation,)
Defendant.)
_____/

Thompson, Zirnhelt, Bowron,
Senger & Rosi, P.C.
Philip R. Rosi, P 31915
Attorney for Plaintiffs

Foster, Swift, Collins
& Coey, P.C.
Webb A. Smith, P 20718
Scott A. Storey, P 30232

Attorneys for Defendant

Terence V. Lynam, Esq.
105 East Washtenaw St.
Lansing, Michigan 48933
Attorney for Defendant

FIRST AMENDED COMPLAINT

AND DEMAND FOR JURY TRIAL

Plaintiffs for themselves and for and on behalf of all persons similarly situated, complain of Defendant and allege:

1. That plaintiffs are now and at all times mentioned or material to the claims asserted herein have been residents and citizens of the State of Michigan and the owners of mineral interests in land in the State of Michigan.

2. That defendant Shell Oil Company is a Delaware corporation with its principal place of business in Houston, Texas, its mailing address being P.O. Box 576, Houston, Texas 77001; that it is and was at the time of the events alleged in this Complaint doing business in the State of Michigan, more particularly, but not exclusively, in the Counties of Mason, Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego, Cheboygan, Montmoreney and Presque Isle; that it maintains as a business address within the State of Michigan, Grandview Plaza Building, Traverse City, in the County of Grand Traverse, Michigan 49684.

3. That plaintiffs Albert K. Brown, Catherine D. Brown, Kent Rosenberg, Arlene Rosenberg, Victor Schuler, Elizabeth Schuler, Donald E. Wood and Ellen L. Wood are owners of interests in minerals underlying various premises in Kalkaska County, Michigan.

4. That plaintiffs Earl Hilliard, Margaret Hilliard, Jerome A. Ray, Karen M. Ray and Kenneth R. Hilliard, are owners of interests in minerals underlying various premises in Manistee County, Michigan.

5. That defendant is the owner of leasehold interests in minerals underlying the property of plaintiffs Albert K. Brown, Catherine D. Brown, Kent Rosenberg, Arlene Rosenberg, Victor Schuler, Elizabeth Schuler, Donald E. Wood, Ellen L. Wood, Jerome A. Ray, Karen M. Ray and Kenneth R. Hilliard by virtue of certain recorded oil and gas leases on lease forms identified as LB-88-68 Michigan.

6. That defendant, its employees or agents, selected the LB-88-68 Michigan form to use when leasing the premises of plaintiffs Albert K. Brown, Catherine D. Brown, Kent Rosenberg, Arlene Rosenberg, Victor Schuler, Elizabeth Schuler, Donald E. Wood, Ellen L. Wood, Jerome A. Ray, Karen M. Ray, and Kenneth R. Hilliard.

7. That defendant is the owner of leasehold interests in the minerals underlying the property of plaintiffs Earl Hilliard and Margaret Hilliard by virtue of a certain recorded oil, gas and mineral lease on a lease form identified as Producers 88 - Michigan (4-71) Paid Up.

8. That defendant, its employees or agents, selected the

Producers 88 - Michigan (4-71) Paid Up form for use when leasing the premises of plaintiffs Earl Hilliard and Margaret Hilliard.

9. That existing upon the premises of plaintiffs are one or more producing gas and/or oil wells, hereinafter referred to as plaintiffs' wells.

10. That defendant is the operator of plaintiffs' wells.

11. That gas pipeline facilities owned by Michigan Consolidated Gas Company and others, otherwise referred to herein as the "wet header" system, connect plaintiffs' wells to the natural gas plant owned by defendant, located in the Township of Kalkaska, County of Kalkaska, and State of Michigan.

12. That the product stream from each well includes, in varying proportions, Water, Crude Oil, Condensate and Natural Gas.

13. That defendant, at the site of each of plaintiffs' wells, removes from the products of the well certain liquids including water, crude oil and condensate.

14. That defendant removes the water and crude oil from the well site by truck or pipeline.

15. That defendant removes the condensate from the well site by truck or pipeline and sells it to others.

16. That defendant injects the balance of the well products, natural gas, into the wet header system, and thereby

transports it to defendant's natural gas plant in Kalkaska Michigan.

17. That defendant, at the gas plant, processes the natural gas produced from plaintiffs' wells and strips; that is, removes, certain liquid hydrocarbons known as natural gas liquids from the natural gas.

18. That defendant sells the natural gas and natural gas liquids to others.

19. That the Natural Gas Royalty provisions of the LB 88-68 - Michigan lease identified in Paragraph 5 are:

> "4. Lessee shall pay lessor, as royalty, one-eighth of the proceeds from the sale of the gas, as such, produced from gas wells on leased premises, and where not sold shall pay Fifty Dollars ($50.00) per annum as royalty from each such well, and such well shall be held as a producing well under paragraph numbered two hereof.
>
> "The lessor to have gas free of charge from any gas well on the leased premises for stoves and inside lights in the principal dwelling house on said land by making his own connections with the well, the use of that gas to be at the lessor's sole risk and expense. The lessee shall pay to lessor for gas produced from any oil well and used by the lessee for the manufacture of gasoline or any other product, as royalty, one-eighth of the market

> value of such gas at the mouth of the well. If said gas is sold by the lessee, then as royalty one-eighth of the proceeds of the sale thereof."

20. That the Natural Gas Royalty provisions of the Producers 88-Michigan (4-71) Paid Up lease, identified in paragraph 7 hereof are:

> 3(a) . . .
> (b) To pay lessor on gas and casinghead gas produced from said land (1) when sold by lessee, one-eighth of the amount realized by lessee, computed at the mouth of the well, or (2) when used by lessee off said land or in the manufacture of gasoline or other product, the market value, at the mouth of the well, of one-eighth of such gas and casinghead gas; (c) . . ."

21. That defendant does not pay plaintiffs the agreed fractional portion of the proceeds defendant receives from the sale of natural gas and natural gas liquids produced from plaintiffs wells.

22. That defendant has breached its contractual duties to plaintiffs by failing to pay plaintiffs proper royalties based upon the sums received by defendant from the sale of natural gas and natural gas liquids produced from plaintiffs' wells.

23. That inherent in the leases between defendant and plaintiffs are certain implied covenants which impose upon defendant several duties including, but not limited to (a) the duty to diligently and properly operate and manage each well

to obtain maximum, optimal return for the lessor thereof within the confines of the lease agreement and (b) the duty to market the products of each well at the most favorable price and upon the most favorable terms available.

24. That defendant imposes charges on plaintiffs for processing the natural gas produced from plaintiffs' wells, and by doing so reduces the amount of royalties that would otherwise be due plaintiffs from the proceeds of natural gas and natural gas liquids.

25. That the charges imposed by defendant on plaintiffs for processing the natural gas produced from plaintiffs' wells greatly exceed the reasonable cost of processing the natural gas.

26. That defendant by imposing unreasonable charges for processing the natural gas produced from plaintiffs wells had violated its duty to diligently and properly operate and manage plaintiffs wells.

27. That defendant by imposing unreasonable charges for processing the natural gas produced from plaintiffs' wells violated its duty to market the products of each well at the most favorable price and upon the most favorable terms available.

28. That, in Michigan, a Severance Tax, is imposed upon producers "engaged in the business of severing from the soil oil or gas." (MCLA 205.301)

29. That plaintiffs are not engaged in the business of severing from the soil oil and gas.

30. That defendant is charging plaintiffs with a prorated share of the severance tax attributed to the production form plaintiffs wells.

31. That defendant is wrongfully charging plaintiffs with a prorated share of the severance tax attributed to the production from plaintiffs wells, and by so doing has not paid plaintiffs the royalties properly due them.

32. That defendant by charging plaintiffs with a prorata share of the severance tax attributable to the production from plaintiffs' wells violated its duty to properly manage plaintiffs' wells and its duty to market the products of each well at the most favorable price and upon the most favorable terms available.

33. That the total sum of royalties which defendant has not paid plaintiffs exceeds, for each plaintiff, the jurisdictional sum of $10,000.00.

34. That the several breaches by defendant of its duties to plaintiffs were willful and wanton, undertaken by defendant with full knowledge of the adverse consequences upon plaintiffs, and as such were material breaches of each of the leases.

CLASS ACTION ALLEGATIONS

35. Plaintiffs bring and prosecute this action pursuant to Rule 208 GCR 1963 as a "class action" for themselves and as representatives of and for and on behalf of all other persons, individual, corporate or governmental, similarly situated; to wit, all owners of mineral interests leased in whole or in part

to defendant, by virtue of either LB-88-68 Michigan form lease or Producers 88 - Michigan (4-71) Paid Up lease, which persons have on such leased premises producing oil and/or gas wells, the product or a portion of which product is transmitted by gas pipeline to defendant's Kalkaska gas plant. Those persons for and on whose behalf this action is brought are hereinafter referred to as "class members."

36. Plaintiffs, on information and belief, allege that the class members number in excess of 100, reside within and without the State of Michigan and own mineral interests distributed among the counties of Mason, Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Autrim, Crawford, Otsego, Cheboygan, Montmoreney and Presque Isle and the joinder of all or even a majority of said class members herein is impracticable if not impossible.

36. The claims of plaintiffs herein are typical, in all important respects, of the claims of each and all of the class members and are based upon and arise out of the identical facts constituting the conduct of defendant.

37. There are substantial questions of law and fact common to the claims of the plaintiffs against the defendant and to the claim of each of the class members against the defendant. Questions of law governing and dispositive of plaintiffs' claim against the defendant are precisely the same as the questions of law governing and dispositive of the claims against the defendant of each class member. Except as to the sole questions of the fractional royalty in any particular lease and the amount of oil, gas, or other hydrocarbons produced from any particular well and the correlative loss thereon to individual class members resulting from wrongful conduct of

defendant, the questions of fact governing and dispositive of plaintiffs' claims against defendant are precisely the same as the questions of fact governing and dispositive of the claims of each class member against the defendant.

38. The prosecution of separate actions by the individual class members, even if possible, would create a risk of (1) inconsistent or varying adjudication with respect to the individual class members against the defendant which would establish incompatible standards of conduct for the defendant or (2) adjudication with respect to individual class members which would as a practical matter be dispositive of the interests of other class members not parties to the adjudications or which would substantially impair or impede the ability of the class members to protect their interests.

39. The plaintiffs will fairly and adequately represent the interests of the class and the individual class members because, by reason of the similarity or identity of the claims of the plaintiffs and the individual class members, the successful assertion of plaintiffs' claims herein will necessarily establish determinations of fact and law adequate to prove the liability of the defendant to each class member.

40. The questions of law and fact common to the plaintiffs against the defendant and to the claims of all class members against the defendant predominate over questions, if any, affecting only individual members and a class action is superior to all other available methods, if in fact any other such methods are available, which plaintiffs deny, for the fair and efficient adjudication of the matters alleged herein.

WHEREFORE, Plaintiffs pray unto this Honorable

Orders from *Brown v. Shell* - No. 81-8858-CK

Court: That this action be declared a Class Action pursuant to Rule 508 GCR 1963 and,

1. That judgment be given plaintiffs and all class members against defendant for the following sums, the total of which exceeds $10,000:

> a. The cumulative sum of all extraordinary and improper charges imposed by defendant as charges for processing natural gas and deducted from plaintiffs and class members royalties.
>
> b. The cumulative sum of all Severance Taxes deducted by defendant from plaintiffs' and class members' royalties.

2. That the Court declare the breaches by defendant to be material breaches of the subject leases resulting in the forfeiture of all lease rights.

3. That the Court grant plaintiffs and class members such other and further relief as shall be agreeable to equity and good conscience, together with costs and attorneys fees.

DEMAND FOR TRIAL BY JURY

Plaintiff, pursuant to Rule 508 GCR 1963 respectfully demands trial by jury on all issues except for equitable issues which must be decided by the Court.

Dated at Traverse City,
Michigan, this 17th day of

NOVEMBER, 1981.

THOMPSON, ZIRNHELT, BOWRON,
SENGER & ROSI, P.C.

/s/_____
Philip R. Rosi,
Attorney for Plaintiffs
229 Lake Ave., P.O. Box 1067,
Traverse City, Michigan 49684
(616) 946-8630

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, CATHERINE D. BROWN,)
KENT ROSENBERG, ARLENE ROSENBERG,)
VICTOR SCHULER, ELIZABETH SCHULER,)
DONALD E. WOOD, ELLEN L. WOOD,)
EARL HILLIARD, MARGARET HILLIARD,)
JEROME A. RAY, KAREN M. RAY,)
and KENNETH R. HILLIARD)
Plaintiffs,)
)
v.)
)
SHELL OIL COMPANY, a Delaware corporation,)
Defendant.)
_____/

Thompson, Zirnhelt, Bowron,
Senger & Rosi, P.C.
Philip R. Rosi, P 31915
Attorney for Plaintiffs

Foster, Swift, Collins & Coey, P.C.
Webb A. Smith, P 20718
Scott A. Storey, P 30232
Attorneys for Defendant

STIPULATION

The parties by their respective attorneys, stipulate and agree that Plaintiffs be permitted to amend their Complaint, without prejudice, in the form appended to Plaintiffs' Motion to Amend, dated November 17, 1981, without costs to either party.

THOMPSON, ZIRNHELT, BOWRON, SENGER & ROSI, P.C.
Attorneys for Plaintiffs

Dated: 12/4/81

By/s/_____
Philip R. Rosi

P.O. Box 1067
Traverse City, Michigan

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Defendant

Dated: 12/4/81

By/s/_____
Webb A. Smith

313 S. Washington Square
Lansing, Michigan 48933

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, CATHERINE D. BROWN,)
KENT ROSENBERG, ARLENE ROSENBERG,)
VICTOR SCHULER, ELIZABETH SCHULER,)
DONALD E. WOOD, ELLEN L. WOOD,)
EARL HILLIARD, MARGARET HILLIARD,)
JEROME A. RAY, KAREN M. RAY,)
and KENNETH R. HILLIARD)
Plaintiffs,)
)
v.)
)
SHELL OIL COMPANY, a Delaware corporation,)
Defendant.)
_____/

Thompson, Zirnhelt, Bowron,
Senger & Rosi, P.C.
Philip R. Rosi, P 31915
Attorney for Plaintiffs

Foster, Swift, Collins & Coey, P.C.
Webb A. Smith, P 20718
Scott A. Storey, P 30232
Attorneys for Defendant

Terence V. Lynam, Esq.
105 East Washtenaw St.

Lansing, Michigan 48933
Attorney for Defendant

MOTION TO AMEND COMPLAINT

NOW COME Plaintiffs, by and through their attorneys, Thompson, Zirnhelt, Bowron, Senger & Rosi, P.C., and moving this Honorable Court, pursuant to GCR 1963.118, for leave to amend the complaint filed herein, show this Honorable Court as follows:

Preliminary discovery in this matter has indicated that the nexus of the controversy involving the parties involves two form leases, the LB 88-68 Michigan, so-called, and the Producers 88 Paid-up, so-called. And, further that judicial economy makes advisable the limiting of issues to be litigated to two, the propriety of defendant charges imposed upon plaintiffs for certain operation of the Kalkaska gas plant and further, defendants imposition upon plaintiffs of a portion of the Severance Tax chargeable to individual wells.

WHEREFORE, your plaintiffs pray that this Honorable Court enter an Order in the within matter granting plaintiffs leave to Amend the Complaint in this matter in the form of First Amended Complaint attached to this Motion.

Dated: November 17, 1981

THOMPSON, ZIRNHELT, BOWRON,
SENGER & ROSI, P.C.
/s/_____
Philip R. Rosi, P 31915

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, CATHERINE D. BROWN,)
KENT ROSENBERG, ARLENE ROSENBERG,)
VICTOR SCHULER, ELIZABETH SCHULER,)
DONALD E. WOOD, ELLEN L. WOOD,)
EARL HILLIARD, MARGARET HILLIARD,)
JEROME A. RAY, KAREN M. RAY,)
and KENNETH R. HILLIARD)
Plaintiffs,)
)
v.)
)
SHELL OIL COMPANY, a Delaware corporation,)
Defendant.)
_____/

Thompson, Zirnhelt, Bowron,
Senger & Rosi, P.C.
Philip R. Rosi, P 31915
Attorney for Plaintiffs

Foster, Swift, Collins & Coey, P.C.
Webb A. Smith, P 20718
Scott A. Storey, P 30232
Attorneys for Defendant

Terence V. Lynam, Esq.
105 East Washtenaw St.

Lansing, Michigan 48933
Attorney for Defendant

ORDER

At a session of said Court, held in the Circuit Courtrooms, City of Traverse City, County of Grand Traverse, State of Michigan, on this _ day of _____, 1981.

PRESENT: HONORABLE CHARLES M. FORSTER, CIRCUIT JUDGE

Upon reading the Stipulation of counsel for the respective parties dated December 4, 1981, and filed in this matter,

IT IS ORDERED that Plaintiffs' Motion to Amend, dated November 17, 1981, and it is hereby Granted. Defendant shall have 20 days from the date hereof to respond to that First Amended Complaint and Demand for Jury Trial.

/s/_____
Charles M. Forster
Circuit Judge
12-16-81

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, CATHERINE D. BROWN,)
KENT ROSENBERG, ARLENE ROSENBERG,)
VICTOR SCHULER, ELIZABETH SCHULER,)
DONALD E. WOOD, ELLEN L. WOOD,)
EARL HILLIARD, MARGARET HILLIARD,)
JEROME A. RAY, KAREN M. RAY,)
and KENNETH R. HILLIARD)
Plaintiffs,)
)
v.)
)
SHELL OIL COMPANY, a Delaware corporation,)
Defendant.)
_____/

Philip R. Rosi (P31915)
Attorney for Plaintiffs

Webb A. Smith (P20718)
Scott A. Storey (P30232)
Terence V. Lynam (P26490)
Attorneys for Defendant

ORDER FOR PARTIAL SUMMARY JUDGMENT
(SEVERANCE TAX ISSUE)

At a session of said Court, held in the Circuit

Orders from *Brown v. Shell* - No. 81-8858-CK

Courts for the County of Grand Traverse, City of Traverse City, State of Michigan, on this _ day of _____, 1982.

PRESENT: HONORABLE CHARLES M. FORSTER, Circuit Judge

Defendant Shell Oil Company having moved this Court for partial summary judgment, and the Court having reviewed Briefs filed by the respective parties and having listened to the oral argument of the parties, and the Court being fully advised in the premises and finding that there is no just reason for delay,

The Court makes the following findings:

1) Plaintiffs are owners of mineral interests leased to Shell Oil Company pursuant to Shell lease form LB-88-68 Michigan and/or Shell lease form Producers 88-Michigan (4/71) paid up, and therefore, as a matter of law, are producers engaged in the business of severing from the soil oil and gas.

2) Plaintiffs as producers engaged in the business of severing from the soil oil and gas, as a matter of law, are bound to bear a portion of any severance tax imposed upon the production of oil and gas from their properties, specifically the Michigan severance tax statute, MSA § 7.351 et seq, MCLA §205.301, et seq.

IT IS HEREBY ORDERED AND ADJUDGED that

Defendant's Motion for Partial Summary Judgment be granted and that Paragraphs 28 through 32 of Plaintiffs' Amended Complaint and Plaintiffs' prayer for judgment in a sum equal to the cumulative sum of all severance tax deducted by Defendant from Plaintiffs' royalties be dismissed with prejudice, and that final judgment to that effect is hereby entered.

/s/_____
CHARLES M. FORSTER,
Circuit Judge
4-6-82

Approved for Entry, as to form:

/s/_____
Philip R. Rosi
Attorney for Plaintiffs

A TRUE COPY
/s/_____
Dep. County Clerk
Grand Traverse Co.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, et al.,
Plaintiffs,

v.

SHELL OIL COMPANY, a
Delaware corporation,
Defendant.

Thompson, Zirnhelt, Bowron,
Senger & Rosi, P.C.
Philip R. Rosi (P31915)
Attorney for Plaintiffs

Rhoades, McKee & Boer
Dale Rhoades (P19386)
Kurt D. Hassberger (P29125)
Attorneys for Plaintiffs

Foster, Swift, Collins &
Coey, P.C.
Webb A. Smith (P20718)
Scott A. Storey (P30232)
Attorneys for Defendant

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs for themselves and for and on behalf of all persons similarly situated, complain of Defendant and allege:

COMMON ALLEGATIONS

1. Plaintiffs are now and at all times mentioned or material to the claims asserted herein have been residents and citizens of the State of Michigan and the owners of mineral interests in land in the State of Michigan.

2. Defendant Shell Oil Company is a Delaware Corporation with its principal place of business in Houston, Texas, its mailing address being P.O. Box 576, Houston, Texas 77001; that it is and was at the time of the events alleged in this Complaint doing business in the State of Michigan, more particularly, but not exclusively, in the counties of Mason, Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego, Cheboygan, Montmorency and Presque Isle; that it maintains as a business address within the State of Michigan, Grandview Plaza Building, Traverse City, in the County of Grand Traverse, Michigan 49684.

In late 1983, Defendant Shell Oil Company accomplished a corporate reorganization and restructuring whereby Shell Western E&P Inc. was formed as a subsidiary of Shell Oil Company. Effective January 1, 1984, Shell Oil Company ("Shell Oil") assigned all of its right, title and interest in the property and products which are the subject of this lawsuit to Shell Western E&P Inc. ("SWEPI") and

SWEPI assumed all of the obligations of Shell Oil with regard thereto. All references herein shall be deemed to be references to Shell Oil through 2/31/83 and SWEPI thereafter.

COUNT I

3. Defendant is the owner of leasehold interests in minerals underlying the property of plaintiffs by virtue of certain recorded oil and gas leases on lease forms identified as LB-88-68 Michigan or Producers 88 - Michigan (4-71) Paid Up.

4. Defendant, its employees or agents, selected the LB 88-68 Michigan and Producers 88-Michigan (4-71) Paid Up forms to use when leasing the premises of plaintiffs.

5. Inherent in the leases between defendant and plaintiffs are certain implied covenants which impose upon defendant several duties including, but not limited to (a) the duty to diligently and properly operate and manage each well to obtain maximum, optimal return for the lessor thereof within the confines of the lease agreement and (b) the duty to market the products of each well at the most favorable price and upon the most favorable terms available.

6. Existing upon the premises of plaintiffs are one or more producing gas and/or oil wells.

7. Defendant is the operator of those wells.

8. In Michigan, a Severance Tax, is imposed upon producers "engaged in the business of severing from the soil oil or gas." (MCLA 205.301)

9. Plaintiffs are not engaged in the business of severing from the soil oil and gas.

10. Defendant is charging plaintiffs with a prorated share of the severance tax attributed to the production from plaintiffs wells.

11. Defendant is wrongfully charging plaintiffs with a prorated share of the severance tax attributed to the production from plaintiffs wells, and by so doing has not paid plaintiffs the royalties properly due them.

12. Defendant, by charging plaintiffs with a prorata share of the severance tax attributable to the production from plaintiffs' wells, violated its duty to market the products of each well at the most favorable price and upon the most favorable terms available.

13. The total sum of royalties which defendant has not paid plaintiffs exceeds, for each plaintiff, the jurisdictional sum of $10,000.00.

14. The several breaches by defendant of its duties to plaintiffs were willful and wanton, undertaken by defendant with full knowledge of the adverse consequences upon plaintiffs and as such were material breaches of each of the leases.

15. Plaintiffs bring and prosecute Count I of this action pursuant to Rule 208 GCR 1963 as a "class action" for themselves and as representatives of and for and on behalf of all other persons, individual, corporate or governmental, similarly situated; to wit, all owners of mineral interests

leased in whole or in part to defendant, by virtue of either LB-88-68 Michigan form lease or Producers 88 - Michigan (4-71) Paid Up lease, which persons have on such leased premises producing oil and/or gas wells, the product or a portion of which product is transmitted by gas pipeline to defendant's Kalkaska gas plant. Those persons for and on whose behalf this action is brought are hereinafter referred to in Count I as "class members."

16. Plaintiffs on information and belief, allege that the class members number in excess of 100, reside within and without the State of Michigan and own mineral interests distributed among the counties of Mason, Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego, Cheboygan, Montmorency and Presque Isle and the joinder of all or even a majority of said class members herein is impracticable if not impossible.

17. The claims of plaintiffs herein are typical, in all important respects, of the claims of each and all of the class members and are based upon the arise out of the identical facts constituting the conduct of defendant.

18. There are substantial questions of law and fact common to the claims of the plaintiffs against the defendant and to the claim of each of the class members against the defendant. Questions of law governing and dispositive of plaintiffs' claim against the defendant are precisely the same as the questions of law governing and dispositive of the claims against the defendant of each class member. Except as to the sole questions of the fractional royalty in any particular lease and the amount of oil, gas, or other hydrocarbons produced from any particular well and the correlative loss thereon to

individual class members resulting from wrongful conduct of defendant, the questions of fact governing and dispositive of plaintiffs' claims against defendant are precisely the same as the questions of fact governing and dispositive of the claims of each class member against the defendant.

19. The prosecution of separate actions by the individual class members, even if possible, would create a risk of (1 inconsistent or varying adjudication with respect to the individual class members against the defendant which would establish imcompatible standards of conduct for the defendant or (2) adjudication with respect to individual class members which would as a practical matter be dispositive of the interests of other class members not parties to the adjudications or which would substantially impair or impede the ability of the class members to protect their interests.

20. The plaintiffs will fairly and adequately represent the interests of the class and the individual class members because, by reason of the similarity or identity of the claims of plaintiffs and the individual class members, the successful assertion of plaintiffs' claims herein will necessarily establish determinations of fact and law adequate to prove the liability of the defendant to each class member.

21. The questions of law and fact common to the plaintiffs against the defendant and to the claims of all class members against the defendant predominate over questions, if any, affecting only individual members and a class action is superior to all other available methods, if in fact any other such methods are available, which plaintiffs deny, for the fair and efficient adjudication of the matters alleged herein.

WHEREFORE, Plaintiffs pray unto this Honorable Court; that this action be declared a Class Action pursuant to Rule 508 GCR 1963 and;

1. That judgment be given plaintiffs and all class members against defendant for the cumulative sum of all Severance Taxes deducted by defendant from plaintiffs' and class members' royalties, the total of which exceeds $10,000.

2. That the Court declare the breaches by defendant to be material breaches of the subject leases resulting in the forfeiture of all lease rights.

3. That the Court grant plaintiffs and class members such other and further relief as shall be agreeable to equity and good conscience, together with costs and attorneys fees.

COUNT II

22. Defendant is the owner of leasehold interests in minerals underlying the property of plaintiffs by virtue of certain recorded oil and gas leases.

23. Defendant, its employees or agents, selected the forms to use when leasing the premises of Plaintiffs.

24. Existing upon the premises of plaintiffs are one or more producing gas and/or oil wells.

25. Defendant is the operator of those wells.

26. Gas pipeline facilities owned by Michigan

Consolidated Gas Company and others, otherwise referred to herein as the "wet header" system, connect these wells to the natural gas plant owned by defendant, located in the Township of Kalkaska, County of Kalkaska, and State of Michigan.

27. The product stream from each well includes, in varying proportions, Water, Crude Oil, Condensate and Natural Gas.

28. Defendant removes from the products of the well certain liquids including water, crude oil and condensate.

29. Defendant removes the water and crude oil from the well site by truck or pipeline.

30. Defendant removes the condensate from the well site by truck or pipeline and sells it to others.

31. Defendant injects the balance of the well products, natural gas, into the wet header system, and thereby transports it to defendant's natural gas plant in Kalkaska Michigan.

32. Defendant, at the gas plant, processes the natural gas produced from plaintiffs' wells and strips; that is, removes, certain liquid hydrocarbons known as natural gas liquids from the natural gas.

33. Defendant sells the natural gas and natural gas liquids to others.

34. Defendant does not pay plaintiffs the fractional

portion of the proceeds defendant receives from the sale of natural gas and natural gas liquids produced from these wells pursuant to their leases with defendant.

35. Defendant has breached its contractual duties to plaintiffs by failing to pay plaintiffs proper royalties based upon the sums received by defendant from the sale of natural gas and natural gas liquids produced from these wells.

36. Inherent in the leases between defendant and plaintiffs are certain implied covenants which impose upon defendant several duties including, but not limited to (a) the duty to diligently and properly operate and manage each well to obtain maximum, optimal return for the lessor thereof within the confines of the lease agreement and (b) the duty to market the products of each well at the most favorable price and upon the most favorable terms available.

37. Defendant imposes charges on plaintiffs for processing the natural gas produced from these wells, and by doing so reduces the amount of royalties that would otherwise be due plaintiffs from the proceeds of natural gas and natural gas liquids.

38. The charges imposed by defendant on plaintiffs for processing the natural gas produced from these wells greatly exceed the reasonable cost of processing the natural gas.

39. Defendant, by imposing unreasonable charges for processing the natural gas produced from these wells, has violated its duty to diligently and properly operate and manage plaintiffs wells.

40. Defendant, by imposing unreasonable charges for processing the natural gas produced from these wells violated its duty to market the products of each well at the most favorable price and upon the most favorable terms available.

41. The total sum of royalties which defendant has not paid plaintiffs exceeds, for each plaintiff, the jurisdictional sum of $10,000.00.

42. The several breaches by defendant of its duties to plaintiffs were willful and wanton, undertaken by defendant with full knowledge of the adverse consequences upon plaintiffs, and as such were material breaches of each of the leases.

43. Plaintiffs bring and prosecute Count II of this action pursuant to Rule 208 GCR 1963 as a "class action" for themselves and as representatives of and for and on behalf of:

> All persons, firms, concerns, receivers, trustees, municipalities, governmental entities, person representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust, exclusive of the State of Michigan, who have, between the dates of January 1, 1981, and January 1, 1984, and all named plaintiffs in the within proceedings who have, at any time, been entitled to royalty payments from Shell pursuant to oil and gas leases under which Shell, at or prior to December 31, 1983, held lessee's interest regarding property which liquids, oil well gas, or oil well liquids which are transported to the Kalkaska Gas

Plant.

Those persons for and on whose behalf this action is brought are hereinafter referred to in Count II as "class members."

44. Plaintiffs, on information and belief, allege that the class members number in excess of 100, reside within and without the State of Michigan and own mineral interests distributed among the counties of Mason, Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego, Cheboygan, Montmorency and Presque Isle and the joinder of all or even a majority of said class members herein is impracticable if not impossible.

45. The claims of plaintiffs herein are typical, in all important respects, of the claims of each and all of the class members and are based upon and arise out of the identical facts constituting the conduct of the defendant.

46. There are substantial questions of law and fact common to the claims of the plaintiffs against the defendant and to the claim of each of the class members against the defendant. Questions of law governing and dispositive of plaintiffs' claim against the defendant are precisely the same as the questions of law governing and dispositive of the claims against the defendant of each class member. Except as to the sole questions of the fractional royalty in any particular lease and the amount of oil, gas, or other hydrocarbons produced from any particular well and the correlative loss thereon to individual class members resulting from wrongful conduct of defendant, the questions of fact governing and dispositive of plaintiffs' claims against defendant are precisely the same as the questions of fact governing and dispositive of the claims

of each class member against the defendant.

47. The prosecution of separate actions by the individual class members, even if possible, would create a risk of (1) inconsistent or varying adjudication with respect to the individual class members against the defendant which would establish incompatible standards of conduct for the defendant or (2) adjudication with respect to individual class members which would as a practical matter be dispositive of the interests of other class members not parties to the adjudications or which would substantially impair or impede the ability of the class members to protect their interests.

48. The plaintiffs will fairly and adequately represent the interests of the class and the individual class members because, by reason of the similarity or identity of the claims of plaintiffs and the individual class members, the successful assertion of plaintiffs' claims herein will necessarily establish determinations of fact and law adequate to prove the liability of the defendant to each class member.

49. The questions of law and fact common to the plaintiffs against the defendant and to the claims of all class members against the defendant predominate over questions, if any, affecting only individual members and a class action is superior to all other available methods, if in fact any other such methods are available, which plaintiffs deny, for the fair and efficient adjudication of the matters alleged herein.

WHEREFORE, Plaintiffs pray unto this Honorable Court:

That this action be declared a Class Action pursuant to Rule

208 GCR 1963 and,

1. That judgment be given plaintiffs and all class members against defendant for the cumulative sum of all extraordinary and improper charges imposed by defendant as charges for processing natural gas and deducted from plaintiffs and class members royalties.

2. That the Court declare the breaches by defendant to be material breaches of the subject leases resulting in the forfeiture of all lease rights.

3. That the Court grant plaintiffs and class members such other and further relief as shall be agreeable to equity and good conscience, together with costs and attorneys fees.

DEMAND FOR TRIAL BY JURY

Plaintiff, pursuant to Rule 508 GCR 1963 respectfully demands trial by jury on all issues except for equitable issues which must be decided by the Court.

Dated at Traverse City, Michigan, this 20th day of March, 1984

THOMPSON, ZIRNHELT, BOWRON, SENGER & ROSI, P.C.

/s/_____
Philip R. Rosi
Attorney for Plaintiffs

Orders from *Brown v. Shell* - No. 81-8858-CK

229 Lake Ave., P.O. Box 1067
Traverse City, MI 49684
(616) 946-8630

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, et al.,
Plaintiffs,

v.

SHELL OIL COMPANY,
a Delaware corporation,
Defendant.

Philip R. Rosi, (P 31915)
Attorney for Plaintiffs

Dale Rhoades (P19386)
Kurt D. Hassberger (P29125)
Attorneys for Plaintiffs

Webb A. Smith, (P20718)
Scott A. Storey, (P30232)
Attorneys for Defendant

STIPULATION

NOW COME the parties, by their respective attorneys, and stipulate as follows:

I

On April 6, 1982, this Court entered as Partial Summary Judgment an order dismissing, with prejudice, Paragraphs 28 through 32 of Plaintiffs' First Amended Complaint and Plaintiffs' prayer for judgment in a sum equal to the cumulative sum of all severance tax deducted by Defendant from Plaintiffs' royalties (hereinafter referred to as "severance tax claim").

II

This Court entered Partial Summary Judgment with the understanding that Plaintiffs would appeal the Court's order and that such appeal would not divest this Court of jurisdiction over the remaining claims of Plaintiffs during the pendency of the Appeal.

III

Plaintiffs have by Stipulation filed a Second Amended Complaint containing 2 counts.

IV

Count I of Plaintiffs' Second Amended Complaint realleges the "severance tax claim" and Count II of Plaintiffs' Second Amended Complaint consists of allegations which were not addressed by the Court's Order of Partial Summary Judgment.

V

Pursuant to GCR 207 and GCR 505, this Court is

empowered to order the severance and separate trial of any claim or issue.

VI

Although the entry of Partial Summary Judgment effectively severed the "severance tax claim" from the remaining claims of Plaintiffs, the record does not clearly provide that the "severance tax claim" of Plaintiffs was severed from the remaining claims of Plaintiffs.

VII

The parties agree that the proposed order, attached hereto, would clarify that Plaintiff's "severance tax claim" has been severed and that this Court's retention of jurisdiction over the remaining claims of Plaintiffs is not affected by Plaintiffs' concurrent appeal of the Order of Partial Summary Judgment.

THOMPSON, ZIRNHELT, BOWRON,
SENGER & ROSI, P.C.
Attorneys for Plaintiffs

By:/s/_____
Philip R. Rosi

229 Lake Ave., P.O. Box 1067
Traverse City, MI 49684

Date: 3-20-84

RHOADES, McKEE & BOER

Attorneys for Plaintiffs

By:/s/_____
Dale Rhoades
Kurt Hassberger
One Waters Building
Grand Rapids, MI 49503

Date: March 28, 1984

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Defendant

By:/s/_____
Webb A. Smith (P20718)
Scott A. Storey (P30232)

313 S. Washington Sq.
Lansing, MI 48933

Date: 3-22-84

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, et al.,
Plaintiffs,

v.

SHELL OIL COMPANY,
a Delaware corporation,
Defendant.

Philip R. Rosi, (P 31915)
Attorney for Plaintiffs

Dale Rhoades (P19386)
Kurt D. Hassberger (P29125)
Attorneys for Plaintiffs

Webb A. Smith, (P20718)
Scott A. Storey, (P30232)
Attorneys for Defendant

ORDER

At a session of said Court, held in the Circuit Courtrooms, City of Traverse City, State of Michigan, this __ day of _____, 1984.

PRESENT: HONORABLE CHARLES M. FORSTER,
Circuit Judge

The Court having reviewed the stipulation of the parties, having entered Partial Summary Judgment on April 6, 1982 upon the express determination that there was no just reason for delay and being fully advised in the premises:

IT IS HEREBY ORDERED that by its order of April 6, 1982, this Court severed the "severance tax claims" of Plaintiffs as alleged in Paragraphs 28 through 32 of Plaintiffs' First Amended Complaint, presently contained in Count I of Plaintiffs' Second Amended Complaint, pursuant to GCR 207 and GCR 505;

IT IS FURTHER ORDERED that this Court's retention of Jurisdiction over the remaining claims of Plaintiffs, now contained in Count II of Plaintiffs' Second Amended Complaint, shall not be affected by Plaintiffs' concurrent appeal of the April 6, 1982 Order of Partial Summary Judgment.

/s/_____
CHARLES M. FORSTER,
Circuit Judge
3-29-84

A TRUE COPY
VIRGINIA WATSON
Grand Traverse County Clerk
By/s/_____
Deputy Clerk of Court

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, et al.,
Plaintiffs,

v.

SHELL OIL COMPANY,
a Delaware corporation,
Defendant.

Philip R. Rosi, (P 31915)
Attorney for Plaintiffs

Dale Rhoades (P19386)
Kurt D. Hassberger (P29125)
Attorneys for Plaintiffs

Webb A. Smith, (P20718)
Scott A. Storey, (P30232)
Attorneys for Defendant

ORDER

At a session of said Court, held in the Circuit Courtrooms, City of Traverse City, State of Michigan, this __ day of _____, 1984.

Orders from *Brown v. Shell* - No. 81-8858-CK

PRESENT: HONORABLE CHARLES M. FORSTER, Circuit Judge

The parties having filed with this Court a Motion to Approve Settlement, the Court having reviewed the relevant pleadings and being fully advised in the premises;

IT IS HEREBY ORDERED that the Motion to Approve Settlement is granted;

IT IS FURTHER ORDERED that a class action is hereby certified subject to the conditions set forth in the Motion to Approve Settlement;

IT IS FURTHER ORDERED that the notice attached to the Motion to Approve Settlement is hereby approved and shall be directed to class members as set forth in the Motion to Approve Settlement;

IT IS FURTHER ORDERED that a hearing to consider final approval of the settlement will be held on May 31, 1984, at 4:15 o'clock p.m. at the Courthouse in Traverse City, Michigan.

/s/_____
CHARLES M. FORSTER,
Circuit Judge
3-29-84

A TRUE COPY
VIRGINIA WATSON
Grand Traverse County Clerk
By/s/_____
Deputy Clerk of Court

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, et al.,
Plaintiffs,

v.

SHELL OIL COMPANY,
a Delaware corporation,
Defendant.

MOTION TO APPROVE SETTLEMENT

NOW COME the plaintiffs, by and through their attorneys, Rhoades, McKee & Boer; and Thompson, Zirnhelt, Bowron, Senger & Rosi, P.C., and the defendant ("Shell"), by and through their attorneys, Foster, Swift, Collins & Coey, P.C., and hereby state that they have entered into a settlement agreement and further state as follows:

1. DEFINITIONS. For purposes of the within Motion, the following definitions shall apply to the following terms:

A. Named Plaintiffs. All references to "Named Plaintiffs" shall be construed to refer to those parties listed on Exhibit A attached hereto and incorporated herein by reference.

B. Kalkaska Gas Plant. The Kalkaska Gas Plant is a gas processing plant owned by the Shell Oil Company located in the Township of Kalkaska, County of Kalkaska, and State of Michigan.

C. Wet Header System. The wet header system is a pipeline transportation system owned by Michigan Consolidated Gas Company through which gas well gas, gas well liquids, oil well gas, and oil well liquids from certain wells are transported to the Kalkaska Gas Plant.

D. Plant Inlet Volume. Plant inlet volume is defined as the total volume of gas plus the calculated gas volume equivalent of the total volume of liquids delivered by Michigan Consolidated Gas Company to Shell at the Kalkaska Gas Plant inlet through the wet header system.

E. Residue Gas. Residue gas is the volume of gas delivered by Shell to Michigan Consolidated Gas Company at the outlet from the Kalkaska Gas Plant.

F. Plant Volume Reduction. Plant volume reduction is the difference between the plant inlet volume and the residue gas volume.

G. Gas Well Gas. Gas well gas is defined as that portion of the well stream produced from a gas well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, is in gaseous form.

H. Gas Well Liquids. Gas well liquids are defined as that portion of the well stream produced from a gas well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, are in liquid form.

I. Oil Well Gas. Oil well gas is defined as that portion of the well stream from an oil well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, is in gaseous form.

J. Oil Well Liquids. Oil well liquids are defined as that portion of the well stream from an oil well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, are in liquid form.

K. Processing. Processing shall be defined as the function performed at the Kalkaska Gas Plant pursuant to which plant products (liquid hydrocarbon products and residue gas) are manufactured from the hydrocarbons transported to the Kalkaska Gas Plant through the wet header system.

L. MCF. MCF is a unit of measurement of gas volume equal to 1,000 cubit feet at 14.73 pounds per square inch atmospheric pressure and 60 degrees Fahrenheit.

M. BTU. One BTU, or British Thermal Unit, is the amount of heat required to raise the temperature of one pound of water 1 degree Fahrenheit.

i. BTU Content. The BTU content is the heating value, expressed in millions of BTU's (MMBTU's) per MCF, of a given volume of gas.

ii. Wet Gas Stream BTU Content. The wet gas stream BTU content is the number of MMBTU's per MCF in a gas well or oil well gas stream measured on a gross wet basis.

iii. Residue Gas BTU Content. The residue gas BTU content is the number of MMBTU's per MCF in the residue gas stream measured on a gross wet basis.

iv. Recoverable BTU's. Recoverable BTU's are the number of MMBTU's measured on a gross wet basis attributable to the liquid hydrocarbon products which would be produced from one MCF of oil well gas or gas well gas, assuming 70% recovery of ethane and 100% recovery of propane and heavier hydrocarbon components from the oil well gas or gas well gas stream in question.

2. SUBJECT MATTER OF SETTLEMENT.

A. Severance Tax Issue. The plaintiffs claim in these proceedings that Shell has wrongfully charged royalty owners for their pro-rata share of the liability for the Michigan Oil and Gas Severance Tax. Shell's Motion for Partial Summary Judgment with respect to the severance tax issue has been granted by this Honorable Court. That ruling has been upheld by the Michigan Court of Appeals and the plaintiffs in these

proceedings have filed an application for leave to appeal to the Michigan Supreme Court. The proposed settlement shall have no substantive effect on the severance tax issue.

B. Remaining Issues. The within settlement shall constitute a full and complete resolution of all claims raised by the plaintiffs in these proceedings, other than the severance tax issue referenced in sub-paragraph (A) above and shall be binding on all parties including members of the class, their successors and assigns.

3. CONDITIONAL CLASS CERTIFICATION. The parties have stipulated and agreed to the entry of an order conditionally certifying that the within proceedings may be maintained as a class action.

A. Definition of Class Members. The parties hereto hereby stipulate and agree that the class shall be defined as follows:

All persons, firms, concerns, receivers, trustees, municipalities, governmental entities, personal representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust, exclusive of the State of Michigan, who have, between the dates of January 1, 1981, and January 1, 1984, and all named plaintiffs in the within proceedings who have, at any time, been entitled to royalty payments from Shell pursuant to oil and gas leases under which Shell, at or prior to

December 31, 1983, held lessee's interest regarding property which produces or has produced gas well gas, gas well liquids, oil well gas, or oil well liquids which are transported to the Kalkaska Gas Plant.

B. Class Certification Contingency. In the event that the total royalty payments paid by Shell during the month of December, 1983, to those individuals or entities falling within the above definition of the class but who elect to be excluded from the action exceeds ten percent (10%) of the total royalty payments paid by Shell to all individuals or entities falling within the above definition of the class during the month of December, 1983, Shell shall have the right to elect to rescind the within Stipulation. In the event that Shell exercises its right to elect to rescind the within Stipulation, the conditional certification that the within proceedings may be maintained as a class action shall be deemed to be null and void and notice of such rescission shall be provided to all members of the class.

C. Notice to Class Members. Attached hereto and incorporated herein by reference is a proposed notice to the individuals or entities falling within the definition of the class.

D. Expenses of Notices to Class Members. Notwithstanding the provisions of Michigan General Court Rule 208.3(F), Shell shall bear all expenses of the notifications to individuals or entities falling within the definition of the class required by Michigan

General Court Rule 208.3.

E. Method of Notification. The parties hereto propose that the notice shall be given to the class in the following manner:

i. By mailing the notice, by first class mail postage pre-paid to all individuals or entities falling within the definition of the class who are currently receiving royalty payments from Shell to the address to which Shell is currently sending such royalty payments.

ii. By mailing the notice, by first class mail postage pre-paid, to all individuals or entities falling within the definition of the class who are not currently receiving royalty payments from Shell to their last known address shown on Shell's records.

4. SETTLEMENT PROVISIONS. The terms of settlement set forth in the parties' settlement agreement have been summarized in the attached Notice of Hearing on the Settlement of Class Action.

5. CONTINGENCIES. The settlement is subject to the following contingencies:

A. Less than 10% exercise of right to be excluded. Under Michigan General Court Rule 208.1(C), individuals and entities falling within the definition of the class have the right to be excluded from the action by submitting an election to be excluded. Shell shall have the right to elect to rescind

the within settlement in the event that the total royalty payments paid by Shell during the month of December, 1983, to those individuals or entities falling within the definition of the class who elect to be excluded from the action exceeds 10% of the total royalty payments paid by Shell to the individuals or entities falling within the definition of the class during the month of December, 1983.

B. Court Alteration of Settlement. In the event that this Court shall alter or fail to approve any provision of the proposed settlement, either Shell of the Named Plaintiffs shall have the right to rescind the settlement.

6. DISTRIBUTION OF THE FIRST PART SETTLEMENT PROCEEDS: Shell shall determine the amounts that shall be distributed to each member of the class (other than the Named Plaintiffs), and shall submit a list of those amounts to counsel for the class. Not later than sixty (60) days after the date of final approval of the settlement in accordance with the terms and conditions hereof, Shell shall distribute the $2,000,000.00 referenced in paragraph 9(A)(i) hereof to counsel for the class, or to the Clerk of the Court as provided in paragraph 9(A)(i) for distribution to the Named Plaintiffs or their counsel and the sum of $500,000.00 referenced in paragraph 9(A)(iii) to counsel for the class, and shall distribute the sum of $2,500,000.00 referenced in paragraph 9(A)(ii) hereof to the members of the class (other than the Named Plaintiffs). All expenses of distributing the First Part of the settlement proceeds to the members of the class (other than the Named Plaintiffs) shall be borne by Shell.

WHEREFORE, the parties hereto respectfully request that the Court enter an Order:

A. Conditionally certifying subject to the terms and conditions hereof that the within proceedings may be maintained as class action and defining the class in accordance with the terms of paragraph 3(A) hereof.

B. Approving the notice attached hereto and directing that such notice be given to the individuals or entities falling within the definition of the class in the manner set forth in paragraph 3(E) hereof.

C. Scheduling a hearing to consider final approval of the settlement on a date not less than thirty (30) days after the mailing of the notice to the individuals or entities falling within the definition of the class.

DATED: 3-27-84

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Shell Oil Company

By/s/_____
Webb A. Smith (P20718)
Business Address:
313 South Washington Square
Lansing, MI 48933

Dated: 3-29-84
THOMPSON, ZIRNHELT, BOWRON, SENGER & ROSI, P.C.
Attorneys for the Plaintiffs

By/s/_____
Philip R. Rosi (P31915)
Business Address:
299 Lake Avenue, P.O. Box 1067
Traverse City, MI 49684

Dated: 3/28/84

RHOADES, McKEE & BOER
Attorneys for the Plaintiffs

By/s/_____
Dale W. Rhoades (P19386)

By/s/_____
Kurt D. Hassberger (P29125)
Business Address:
611 Waters Building
Grand Rapids, MI 49503

EXHIBIT A

NOTICE OF HEARING ON SETTLEMENT OF CLASS ACTION

Under an agreement reached between the parties an order has been entered by Circuit Judge, Charles M. Forster conditionally certifying that a lawsuit entitled Albert K. Brown, et al v Shell Oil Co, Circuit Court for the County of Grand Traverse, State of Michigan, File No. 81-8858-CK, may be maintained as a class action. The Class is defined as follows:

> All persons, firms, concerns, receivers, trustees, municipalities, governmental entities, personal representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust, exclusive of the State of Michigan, who have, between the dates of January 1, 1981, and January 1, 1984, and all named plaintiffs in the within proceedings who have, at any time, been entitled to royalty payments from Shell pursuant to oil and gas leases under which Shell, at or prior to December 31, 1983, held lessee's interest regarding property which produces or has produced gas well gas, gas well liquids, oil well gas, or oil well liquids which are transported to the Kalkaska Gas Plant.

This notice has been provided to you because you are an individual or entity falling within the definition of the Class.

The plaintiffs in that lawsuit are the parties listed on Exhibit A ("plaintiffs"). Plaintiffs claim that they are royalty owners under oil and gas leases covering property in several northern Michigan counties leased to the Shell Oil Company or its subsidiary ("Shell"). The hydrocarbons produced under these leases are transported through a pipeline owned by the Michigan Consolidated Gas Company to a gas processing plant owned by Shell located in Kalkaska Township, Michigan ("Kalkaska Gas Plant"). The plaintiffs brought suit against Shell on behalf of themselves and all other royalty owners, except the State of Michigan, under Shell leases where hydrocarbons are produced and subsequently processed at the Kalkaska Gas Plant.

The claims of the plaintiffs, each of which have been denied by Shell, are as follows:

A. Plaintiffs claim royalty owners are entitled to be paid royalties based upon the value of products which are manufactured at the Kalkaska Gas Plant and are attributable to their lease. Alternatively, plaintiffs claim that the difference between the total value of those plant products and the value actually credited to the lease is excessive.

B. Plaintiffs claim Shell is not authorized to deduct from royalties costs for dehydration, compression, and sour-gas treatment.

C. Plaintiffs claim Shell is not authorized to withhold from royalty payments amounts necessary to pay a pro-rata share of the Michigan Oil and Gas Severance Tax. Plaintiffs' severance tax claims are

not affected by the settlement agreement explained below.

D. Plaintiffs claim Shell breached the oil and gas leases and they should be canceled.

The plaintiffs and Shell have agreed to a settlement which has been tentatively approved by Judge Forster. A hearing to consider final approval of the settlement has been scheduled for 4:15 o'clock p.m. on the 31st day of May, 1984, at the Grand Traverse County Circuit Court. The settlement terms have been divided into two parts.

A. The First Part.

i. Plaintiffs. Shell will pay $2,000,000.00 to the plaintiffs which will be first utilized to reimburse them, for all out-of-pocket expenses incurred in the lawsuit. The remaining amount will be divided among the plaintiffs as agreed upon by them.

ii. Additional Members of the Class. Shell will pay to the Class members (other than the plaintiffs) $2,500,000.00 to be divided among Class members (other than the plaintiffs) in proportion to royalties attributable to liquid hydrocarbon products manufactured at the Kalkaska Gas Plant between January 1, 1978 and December 31, 1983.

iii. Attorneys Fees. Shell will pay $500,000.00 to the attorneys for the Class, as attorneys fees attributable to the First Part of the settlement.

B. The Second Part. Shell will alter its calculation of royalties to Class members effective January 1, 1984. This change will be implemented as soon as practicable after the date of final settlement approval, but not later than one hundred and twenty (120) days after that final settlement approval unless extended by Court order for good cause shown. Additional royalties payable under the new calculation between January 1, 1984, and the date of implementation will be paid to Class members within sixty (60) days after implementation, unless extended by Court order for good cause shown. Under the new calculation, the following amounts will form the basis for the payment of royalties to Class members:

i. Gas Well Gas and Oil Well Gas. The amount attributed to the lease for that portion of the well stream produced from a gas well or oil well which, when injected into the wetheader system, is in a gaseous state ("Wet Gas") shall be based upon a value for each thousand cubic feet (MCF) of such Wet Gas produced from a given well, which amount shall be the sum of the following:

(a) The Michigan Consolidated Gas Company gas purchase contract price then in effect for a given well ("Mich-Con Price") multiplied by the average heating value expressed in British Thermal Units ("BTU content") per MCF of the gas redelivered during the month in question by Shell to Michigan Consolidated Gas Company at the Kalkaska Gas Plant after processing ("Residue Gas");

(b) An additional amount which shall be equal to the value of the Kalkaska Gas Plant liquid products attributable to each MCF of such Wet Gas less the value of the reduction in gas volume attributable to the production of such liquid products based upon the then current Mich-Con price, multiplied by a fraction whose numerator is the BTU content (per MCF) of the Wet Gas produced from such well less the average BTU content (per MCF) of the Residue Gas and whose denominator shall be the BTU's (per MCF) recoverable in liquid form from such Wet Gas.

ii. Gas Well Liquids. The lease shall be attributed 84% of the value of the Kalkaska Gas Plant products attributed to the portion of the well stream produced"from gas wells on such lease which is in a liquid state when injected into the wetheader system.

iii. Oil Well Liquids. The lease shall be attributed 83% of the value of the Kalkaska Gas Plant products attributed to the portion of the well stream produced from oil wells on such lease which is in a liquid state when injected into the wetheader system.

iv. Attorneys Fees. Attorneys for the Class will receive $2,000,000.00 from the Second Part of the settlement as follows: effective January 1, 1984, 50% of the additional amount payable to each Class member under the new royalty calculation method will be paid to the attorneys until the total sum of $2,000,000.00 is paid. Attorneys fees will be paid solely from additional royalties and the payment of attorney fees will not result in any Class member

receiving less royalty than that Class member would have received under Shell's current method for computing royalties.

v. Financial Consequences For the Class. Counsel for the Class, based upon opinions of its experts, represents, but does not guarantee, that their best estimate of additional royalties that will be paid to the Class annually is between $4,000,000.00 and $5,000,000.00. The foregoing estimate is based upon current production levels, current product compositions, current market and contract prices, and other information provided by Shell. The address of counsel to whom inquiries may be directed is as follows:

Rhoades, McKee & Boer
611 Waters Building
Grand Rapids, MI 49503

Thompson, Zirnhelt, Bowron, Senger & Rosi,
P.C. 299 Lake Avenue
P.O. Box 1067
Traverse City, MI 49684

Inquiries shall be in writing, shall identify the royalty interest and lease by name, location, and check stub identification number, and shall include an address to which responses may be directed.

AS A MEMBER OF THE CLASS YOU HAVE A RIGHT TO BE EXCLUDED FROM THE ACTION BY SUBMITTING A WRITTEN ELECTION TO BE

EXCLUDED WITH THE CLERK OF THE GRAND TRAVERSE CIRCUIT COURT ON OR BEFORE May 14, 1984. IN THE ABSENCE OF SUCH AN ELECTION EACH OF THOSE INDIVIDUALS AND ENTITIES FALLING WITHIN THE ABOVE DEFINITION OF THE CLASS WILL BE DEEMED A MEMBER OF THE CLASS. IN ADDITION, ANY MEMBER OF THE CLASS MAY, BUT IS IN NO OBLIGATION TO INTERVENE IN THE ACTION. UPON FINAL APPROVAL OF THE SETTLEMENT, A FINAL JUDGMENT WILL BE ENTERED IN ACCORDANCE WITH THE TERMS OF THE SETTLEMENT WHICH WILL BIND ALL MEMBERS OF THE CLASS.

EXHIBIT A

Jerome and Irene Marcenkowski
5032 Wah Wah Soo Drive
Gaylord, MI 49735

Arthur and Waive Maski
3941 Austin
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Anthony and Johanna Myszkier
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Gaylord, MI 49735

1st National Bank of Petoskey
Trustee under the Stanley and
Helen Styles Trust
Petoskey, MI 49770

Arthur Matusiak
Route #3, 2750 Mancelona Road
Gaylord, MI 49735

Robert J. Van Dellen
Box 811
Cadillac, MI 49601

Ann Bickley Van Dellen
Chester Van Dellen, Jr.
Judy Ann Van Dellen
Chester Van Dellen, Jr. and Judy Van Dellen
Chester Van Dellen, Jr. and Robert J.
Van Dellen, Co-trustees under the Anne Van Dellen Trust

Orders from *Brown v. Shell* - No. 81-8858-CK

Ann Van Dellen, Guardian of the Estate
of Chester Van Dellen PRC Oil & Gas Co.
P.O. Box 850
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Dixie Lillian Merrithew
5934 Sparr Road
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Joel D. Meister
5526 Clark Road
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Ellis Meister
545 Old Kent Building
Grand Rapids, MI 49503

William Fisher
5526 Sylvia
Dearborn Heights, MI 48125

Hugh D. Bowling
Route #1
Bear Lake, MI 49614

Kathleen F. Bowling
Route #1
Bear Lake, MI 49614

Hugh D. Bowling and Kathleen F. Bowling
Route #1
Bear Lake, MI 49614

Orders from *Brown v. Shell* - No. 81-8858-CK

Patrice Freel
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Michael Freel
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Donald Meister
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Stanton, MI 48888

Gerald Meister
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Virginia Koskela
19350 Old Homestead
Harper Woods, MI 48225

Delbert Meister
394 County Road 480
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Wialidm J. Strickler
1425 South Mission Road
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Kent and Arlene Rosenberg
Route #2, Box 455
Kalkaska, MI 49646

Donald E. and Ellen Wood

Orders from *Brown v. Shell* - No. 81-8858-CK

P.O. Box 494
110 No. Coral Street
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Albert K. and Catherine Brown
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Jerome A. and Karen Ray
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Manistee, MI 49660

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Eli W. and Margaret Hilliard

28305 Briar Hill
Farmington Hills, MI 48018

Earnest and Betty Hilliard
P.O. Box 106
Kaleva, MI 49645

George and Sonia Lewis
Route #2, Box 131
Kalkaska, MI 49646

Archie Black, Trustee of
the Archie Black Trust
Johannesburg, MI 49751

Comerica Bank, Detroit; Maxine
Koscielniak and Jean Cooley,
Co-Successor Trustees of the Mary Black Trust
501 W. Main
Gaylord, MI 49735

Raymond Cooley
Johannesburg, MI 49751

Matt and Bertha Kolb
Suite 937, Spitzer Bldg.
Toledo, OH 43604

Francis and Mary Latuszek
Star Route, Box 173
Johannesburg, MI 49751

James and Roberta Lawnichak

Orders from *Brown v. Shell* - No. 81-8858-CK

5685 Sparr Road
Gaylord, MI 49735

Mose and Melvena Weber
Star Route, Box 525
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Bruno C. Muzyl
P.O. Box 384
Gaylord, MI 49735

Charles and Maryetta House
Route #1
Gaylord, MI 49735

Walter and Leona Campbell
Star Route, Box 57
Johannesburg, MI 49751

Willard and Sharon L. Brown
Star Route, Box 235
Johannesburg, MI 49751

Ina Jean Fox, Personal Representative
of the Estate of Robert B. Campbell
P.O. Box 71
Johannesburg, MI 49751

Dale W. and Ina Jean Fox
P.O. Box 71
Johannesburg, MI 49751

Leah P. Welch

Orders from *Brown v. Shell* - No. 81-8858-CK

P.O. Box 99
Johannesburg, MI 49751

Lila Mae Keskine
Star Route, Box 530
Johannesburg, MI 49751

Ivan Eckler, survivor of himself
and Martina Eckler, deceased
820 Park Avenue, Route
Mancelona, MI 49659

Jane Galvin
663 W. Orchard
Traverse City, MI 49684

Stanley S. Styles and Gregory D. Styles,
Trustees under the Douglas Styles Trust
Stanley S. Styles and Gregory D. Styles,
Trustees under the Dyann M. Otero Trust Stanley S. Styles
Gregory D. Styles, d/b/a
Stangor Land Company
P.O. Box 429
Gaylord, MI 49735

Empire National Bank, Trustee
under the Norine E. Weber Trust
P.O. Box 1220
Traverse City, MI 49684

Craig H. Curtiss
20490 Harper Avenue
Harper Woods, MI 48225

Orders from *Brown v. Shell* - No. 81-8858-CK

Beverly A. Curtiss
20490 Harper Avenue
Harper Woods, MI 48225

Craig H. and Beverly A. Curtiss
20490 Harper Avenue
Harper Woods, MI 48225

Craig H. Curtiss
d/b/a C.H. Curtiss & Associates
20490 Harper Avenue
Harper Woods, MI 48225

Old Kent Bank and Trust Company,
Trustee under the Martin Veraghen Trust
Old Kent Bank and Trust Company,
Trustee under the Vera Veraghen Trust
Old Kent Bank and Trust Company and
Timothy Hillegonds, Trustee under the
Russell Klaasen Trust
Trust Department
Old Kent Bank and Trust Company
One Vandenberg Center
Grand Rapids, MI 49503

Comerica Bank, Detroit, Trustee
under the Raymond Butka Trust
501 W. Main
Gaylord, MI 49735

Carolyn M. Webber
Route #3, Box 270
Kalkaska, MI 49646

Richard Schneider
d/b/a Sandy & Company
P.O. Box 1660
Traverse City, MI 49685

Vern M. and Ann T. Jones
1842 Lathrup Street
Saginaw, MI 48603

Pacesetter Bank and Trust Company, Grand Traverse
P.O. Box 589
Traverse City, MI 49684
Trustee under the following trusts:

Kolen Ackerman Family Mineral Trust
Roy A. Bancroft Trust
Howard F. Biscard Revocable Intervivos Trust Agreement Clous Family Trust Fink Family Trust
Leeta M. Fudge Revocable Intervivos Trust Agreement
Bertha C. Heaton Revocable Intervivos Trust Agreement
Marshall L. Hoffman Revocable Intervivos Trust Agreement
Dee N. Jefferson Trust Agreement
Gary D. Jefferson Irrevocable Trust Agreement
Morgan Family Trust
Ralph Joseph Ockert Revocable Intervivos Trust Agreement
Elenora A. Pulaski Irrevocable Trust Agreement
Rawlings Family Trust
Irma R. Rosenberg Revocable Intervivos Trust Agreement
Rudolph A. and Vesta A. Sedlacek Irrevocable

Intervivos Trust Agreement
Peter P. Sedlar Revocable Intervivos Trust
Peter Sedlar Marital Trust
Ann E. Sedlar Revocable Trust
Svec Family Trust
(Leonard B.) Taylor Family Trust
Raymond G. Taylor Family Trust
Waslawski Family Trust
Ireta Leora Weidenhamer Family Trust
Barbara Usher Windrim Revocable Intervivos
Trust Agreement
Wurm Family Trust
Pierce Stocking Trust

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF GRAND TRAVERSE

File No. 81-8858-CK

ALBERT K. BROWN, et al.,
Plaintiffs,

v.

SHELL OIL COMPANY,
a Delaware corporation,
Defendant.

JUDGMENT RE ALLEGATIONS OF COUNT II OF PLAINTIFF'S SECOND AMENDED COMPLAINT

At a session of said Court, held in the Circuit Courtrooms, County of Grand Traverse, City of Traverse City, State of Michigan, on this __ day of __, 1984.

PRESENT: HON. CHARLES M. FORSTER,
Circuit Judge

This matter having come unto be heard pursuant to a Motion to Approve Settlement filed jointly by counsel for the plaintiffs and defendant, and

The Court having entered an Order certifying that the allegations contained in Count II of plaintiffs' Second Amended Complaint may be maintained as a class action and defining the Class as follows:

> All persons, firms, concerns, receivers, trustees, municipalities, governmental entities, personal representatives, agents, institutions, associations, partnerships, corporations, companies, and persons acting under declarations of trust, exclusive of the State of Michigan, who have, between the dates January 1, 1981, and January 1, 1984, and all parties identified on Exhibit A who have, at any time, been entitled to royalty payments from the Shell Oil Company pursuant to oil and gas leases under which Shell, at or prior to December 31, 1983, held lessee's interest regarding property which produces or has produced gas well gas, gas well liquids, oil well gas, or oil well liquids which are transported to the Kalkaska Gas Plant.

and,

Notice having been provided to the Class in a manner previously approved by this Court, which notice included the terms of a Proposed Settlement Agreement entered into by and between the plaintiffs and defendant resolving the claims asserted by the plaintiffs in Count II of plaintiffs' Second Amended Complaint, and containing a notice that a hearing to consider final approval of that Settlement Agreement would be held on May 31, 1984, at 4:15 p.m. at the Courthouse in Traverse City, Michigan, and advising potential members of the Class of their right to file a written election to be excluded

from the Class, and the Clerk of the Court having received written elections to be excluded from the Class from the following parties:

a) Pearl I. and Molly Harrigan
b) James and Rose Rudy
c) William F. Cook, Harriet C. Cook, Byron J. Cook and Dolores M. Cook, Trustees
d) Jack D. and Marjorie Highfied
e) James L. Kloosterman and Priscilla I. Kloosterman

and,

The Court having reviewed the terms of the proposed settlement of the claims asserted by the plaintiffs in Count II of plaintiffs' Second Amended Complaint and having found those terms to be fair and reasonable.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Elections to be Excluded. The elections to be excluded from the Class filed by the above-referenced parties are hereby accepted by the Court and the terms of the within Judgment shall not be binding upon and shall not benefit those parties.

2. Definitions. For purposes of this Judgment, the following definitions shall apply:

(A) Named Plaintiffs. All references to "Named Plaintiffs" shall be construed to refer to those parties listed on Exhibit A attached hereto and incorporated

herein by reference.

(B) Kalkaska Gas Plant. The Kalkaska Gas Plant is a gas processing plant owned by the Shell Oil Company located in the Township of Kalkaska, County of Kalkaska, and State of Michigan.

(C) Wet Header System. The wet header system is a pipeline transportation system owned by Michigan Consolidated Gas Company through which gas well gas, gas well liquids, oil well gas, and oil well liquids from certain wells are transported to the Kalkaska Gas Plant.

(D) Plant Inlet Volume. Flame inlet volume is defined as the total volume of gas plus the calculated gas volume equivalent of the total volume of liquids delivered by Michigan Consolidated Gas Company to Shell at the Kalkaska Gas Plant inlet through the wet header system.

(E) Residue Gas. Residue gas is the volume of gas delivered by Shell to Michigan Consolidated Gas Company at the outlet from the Kalkaska Gas Plant.

(F) Plant Volume Reduction Plant volume reduction is the difference between the plant inlet volume and the residue gas volume.

(G) Gas Well Gas. Gas well gas is defined as that portion of the well stream produced from a gas well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, is in gaseous form.

(H) Gas Well Liquids. Gas well liquids are defined as that portion of the veil stream produced from a gas well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, are in liquid form.

(I) Oil Well Gas. Oil well gas is defined as that portion of the well stream from an oil well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, is in gaseous form.

(J) Oil Well Liquids. Oil well liquids are defined as that portion of the well stream from an oil well which, when injected into the wet header system for transportation to the Kalkaska Gas Plant, are in liquid form.

(K) Processing. Processing shall be defined as the function performed at the Kalkaska Gas Plant pursuant to which plant products (liquid hydrocarbon products and residue gas) are manufactured from the hydrocarbons transported to the Kalkaska Gas Plant through the wet header

(L) MCF is a unit of measurement of gas equal to 1,000 cubic feet at 14.73 pounds per square inch atmospheric pressure and 60 degrees fahrenheit.

(M) BTU. One BTU, or British Thermal Unit, is the amount of heat required to raise the temperature of one pound of water 1 fahrenheit.

i. BTU Content. The BTU content is the heating value, expressed in millions of BTU's (MMBTU's) per MCF, of a given volume of gas.

ii. Wet Gas Stream BTU Content. The wet stream BTU content is the number of MMBTU's per a gas well gas or oil well gas stream measured on a gross wet basis.

iii. Residue Gas BTU Content. The residue gas BTU content is the number of MMBTU's per MCF in the residue gas stream measured on a gross wet basis.

iv. Recoverable BTU'S. Recoverable BTU's are the number of MMBTU's measured on a gross wet basis attributable to the liquid hydrocarbon products which would be produced from one MCF of oil well gas or gas well gas, assuming 70% recovery of ethane and 100% recovery of propane and heavier hydrocarbon components from the oil well gas or gas well gas stream in question.

3. Financial Terms. The financial terms of this Judgment have been divided into two parts, the terms and conditions of which shall constitute an amendment to be incorporated by reference into each oil and gas lease agreement between the parties hereto which are the subject matter of this action and shall bind subsequent purchasers, assigns, or successors under the oil and gas leases.

(A) The First Part.

i. Named Plaintiffs. Shell will pay $2,000,000.00 to the Named Plaintiffs which will be first utilized to reimburse them for all out-of-pocket expenses incurred in the lawsuit. The remaining amount will be divided among the Named Plaintiffs as agreed by them.

ii. Additional Members of the Cass. Shell will pay to the Class members (other than the Named Plaintiffs) $2,500,000.00 to be divided among Class members (other than the Named Plaintiffs) in proportion to royalties attributable to liquid hydrocarbon products manufactured at the Kalkaska Gas Plant between January 1, 1978 and December 31, 1983.

iii. Attorneys Fees. Shell will pay $500,000.00 to the attorneys for the Class, as attorneys fees attributable to the First Part of the settlement.

(B) The Second Part. Shell will alter its calculation of royalties to Class members effective January 1, 1984. This change will be implemented as soon as practicable after the date of final settlement approval, but not later than one hundred and twenty (120) days after that final settlement approval unless extended by Court order for good cause shown. Additional royalties payable under the new calculation between January 1, 1984, and the date of implementation will be paid to Class members within sixty (60) days after implementation, unless extended by Court order for good cause shown. Under the new

-calculation, the following amounts will form the basis for the payment of royalties to Class members:

i. Gas Well Gas and Oil Well Gas. The amount attributed to the lease for gas well gas and oil well gas shall be based upon a value for each MCF of gas well gas or oil well gas produced from a given well, which amount shall be the sum of the following:

(a) The Michigan Consolidated Gas Company gas purchase contract price then in effect for the given well, multiplied by the average BTU content per MCF of residue gas delivered by Shell to Michigan Consolidated Gas Company during the month in question.

(b) An additional amount which shall be equal to the value at the tailgate of the Kalkaska Gas Plant of the liquid products attributable to each MCF of oil well gas or gas well gas less the value of the plant volume reduction attributed to the production of such liquid products based upon the then -- current Michigan Consolidated Gas purchase contract price attributable to the well in question multiplied by a fraction whose numerator shall be the BTU content of the wet gas stream from such wells less the average BTU content of the residue gas and whose denominator shall be the recoverable BTU's.

ii. Gas Well Liquids. The lease shall be attributed 84% of the value, at the tailgate of the Kalkaska Gas Plant, of gas well liquids attributed to the lease in question.

iii. Oil Well Liquids. he lease shall be attributed 83% of the value, at the tailgate of the Kalkaska Gas Plant, of gas well liquids attributed to the lease in question.

iv. Attorneys fees. Shell shall pay the sum of $2,000,000.00 from the Second Part of the settlement to counsel for the Class. Attorneys fees shall be paid as follows effective January 1, 1984, 50% of the amounts payable to each Class member under the new royalty calculation method outlined above which exceed royalty payments that would have been paid under Shell's current method for computing royalty payments shall be paid to the attorneys on the same dates that the remaining 50% of such additional royalties are paid to Class members until the total sum of $2,000,000.00 has been as paid. Attorneys fees will be paid solely from additional royalties and will, in no event, result in any Class member receiving at any time less royalty than that Class member would have received under Shell's current method for computing royalty payments as a result of the payment of attorneys fees.

4. Distribution of the "First Part" Proceeds. Shell shall determine the amounts that shall be distributed to each member of the Class (other than the Named Plaintiffs) and shall submit a list of those amounts to the Court. Not later than sixty (60) days after the date hereof, Shell shall distribute the $2,000,000.00 referenced in paragraph 3(A)(i) hereof to counsel for the Class, or to the Clerk of the Court as provided in paragraph 3(A)(i) for distribution to the Named Plaintiffs or their counsel and the sum of $500,000.00 referenced in

paragraph 3(A)(iii) to counsel for the Class, and shall distribute the sum of $2,500,00.00 referenced in paragraph 3(A)(ii) hereof to the members of the Class (other than the Named Plaintiffs). All expenses of distributing the First Part of the settlement proceeds to the members of the Class (other than the Named Plaintiffs) shall be borne by Shell.

4. Recording. This Judgment shall be recorded by defendant in the office of the Register of Deeds for each county where the real property is located for which the various oil and gas lease agreements have been recorded.

/s/_____
CHARLES M. FORSTER,
Circuit Judge
5-31-84

NOTICE OF ENTRY WAIVED:

FOSTER, SWIFT, COLLINS &
COEY, P.C.

By/s/_____
Webb A. Smith (P20718)
Attorney for Defendant

THOMPSON, ZIRNHELT, BOWRON,
SENGER & ROSI, P.C.

By/s/_____
Philip R. Rosi (P31915)
Attorneys for the Plaintiffs

RHOADES, McKEE & BOER

By/s/_____
Dale W. Rhoades (P19386)

By/s/_____
Kurt D. Hassberger (P29125)
Attorneys for the Plaintiffs

A TRUE COPY
VIRGINIA A. WATSON
Grand Traverse County Clerk

By/s/_____
Holly Fall
Deputy County Clerk

APPENDIX M

OIL, GAS AND MINERALS 319.1

* * *

P.A.1939, No. 61, Imd. Eff. May 3

AN ACT to provide for a supervisor of wells; to prescribe his powers and duties; to provide for an advisory board and an appeal board; to prescribe their powers and duties; to provide for the prevention of waste and for the control over certain matters, persons and things relating to the conservation of oil and gas, and for the making and promulgation of rules, regulations and orders relative thereto; to provide for the plugging of wells and for the entry on private property for that purpose; to provide for the enforcement of such rules, regulations and orders and of the provisions of this act, and to provide penalties for the violations thereof; and to provide for the assessment and collection of certain fees. Amended by P.A. 1951, No. 190, § 1, Eff. Sept. 28.

The People of the State of Michigan enact:

319.1. Declaration of policy; conservation of oil and gas

Sec. 1. It has long been the declared policy of this state to foster conservation of natural resources to the end that our citizens may continue to enjoy the fruits and profits thereof. Failure to adopt such a policy in the pioneer days of the state permitted the unwarranted slaughter and removal of

magnificent timber abounding in the state, which resulted in an immeasurable loss and waste. In an effort to replace some of this loss, millions of dollars have been spent in reforestation, which could have been saved had the original timber been removed under proper conditions.

Within the past few years extensive deposits of oil and gas have been discovered which have added greatly to the natural wealth of the state, and if properly conserved can bring added prosperity for many years in the future to our farmers and land owners, as well as to those engaged in the exploration and development of this great natural resource. The interests of the people demand that exploitation and waste of oil and gas be prevented so that the history of the loss of timber may not be repeated.

It is accordingly the declared policy of the state to protect the interests of its citizens and land owners from unwarranted waste of gas and oil and foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of these natural products. To that end this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation.

* * *

319.2. Definitions

Sec. 2. Unless the context requires a different meaning, the words defined in this section shall have the following meaning when found in this act, to-wit:

(a) "Person" means any natural person, corporation, association, partnership, receiver, trustee, so-called common law or statutory trust, guardian, executor, administrator and a fiduciary of any kind.

(b) "Oil" means natural crude oil or petroleum and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods and which are not the result of condensation of gas after it leaves the underground reservoir.

(c) "Gas" means a mixture of hydrocarbons and varying quantities of nonhydrocarbons in a gaseous state which may or may not be associated with oil, and including those liquids resulting from condensation.

(d) "Pool" means an underground reservoir containing a common accumulation of oil or gas or both. Each productive zone of a general structure which is completely separated from any other zone in the structure, or for the purposes of this act may be so declared by the supervisor of wells, is covered by the word "pool" as used herein.

(e) "Field" means the general area which is underlain or appears to be underlain by at least 1 pool; and "field" also includes the underground reservoir or reservoirs containing such oil or gas, or both. The words "field" and "pool" mean the same thing when only one underground reservoir is involved; however, "field," unlike "pool," may relate to 2 or more pools.

(f) "Product" means any commodity or thing made or manufactured from oil or gas, and all derivatives of oil or gas,

including refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, naphtha, distillate, gasoline, casing-head gasoline, natural gas gasoline, kerosene, benzine, wash oil, waste oil, lubricating oil, and blends or mixtures of oil or gas or any derivatives thereof whether enumerated or not.

(g) "Owner" means the person who has the right to drill into and produce from any pool, and to appropriate the production either for himself or for himself and another or others.

(h) "Producer" means the operator, whether owner or not, of a well or wells capable of producing oil or gas or both in paying quantities.

(i) "Commission" means the commission of natural resources for the state of Michigan.

(j) "Supervisor" means the supervisor of wells as provided by this act.

(k) "Board" means the advisory board appointed, as provided in this act, by the supervisor of wells.

(l) "Waste" in addition to its ordinary meaning includes:

(1) "Underground waste" as those words are generally understood in the oil business, and in any event to embrace (1) the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive,

of any pool, and the locating, spacing, drilling, equipping, operating, or producing of any well or wells in a manner to reduce or tend to reduce the total quantity of oil or gas ultimately recoverable from any pool, and (2) unreasonable damage to underground fresh or mineral waters, natural brines, or other mineral deposits from operations for the discovery, development, and production and handling of oil or gas.

(2) "Surface waste," as those words are generally understood in the oil business, and in any event to embrace (1) the unnecessary er excessive surface loss or destruction without beneficial use, however caused, of gas, oil, or other product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing well or wells, or incident to or resulting from inefficient storage or handling of oil, (2) the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life or property, or other environmental values from or by oil and gas operations; and (3) the drilling of unnecessary wells.

(3) "Market waste," which shall embrace the production of oil or gas in any field or pool in excess of the market demand as defined herein.

(m) The words "market demand" as used herein shall be construed to mean the actual demand for oil or gas from any particular pool or field for current requirements for current consumption and use within or outside the state, together with the demand for such amounts as are necessary

for building up or maintaining reasonable storage reserves of oil or gas or the products thereof.

(n) "Illegal oil or gas" means oil or gas which has been produced by any owner or producer in violation of this act, rules promulgated pursuant to this act or orders of the supervisor.

(o) "Illegal product" means any product of oil or gas or any part of which was processed or derived in whole or part knowingly from illegal oil or gas.

(p) "Illegal conveyance" means any conveyance by or through which illegal oil or gas or illegal products are being transported.

(q) "Illegal container" means any receptacle which contains illegal oil or gas or illegal products.

(r) "Tender" means a permit or certificate of clearance for the transportation of oil or gas or products, approved and issued or registered under the authority of the supervisor.

* * *

319.3. Supervisor of wells; assistants; advisory board, conservation commission to act as appeal board; salaries, expenses, offices

Sec. 3. (1) The director of the department of natural resources shall act as the supervisor of wells. The director shall designate, with the approval of the commission, suitable assistants as are required to carry out this act, and after

conference with and recommendations by oil or gas producers or operators or their representatives, and subject to approval by the commission, shall appoint 8 persons who shall constitute the advisory board. Six members of the board shall be chosen from oil or gas producers or operators, or their managing agents or representatives, having ownership, production, or operations within this state. However, not less than 3 members of the board shall be independent oil or gas producers or operators whose ownership, production, or operations are chiefly within this state. A company or its subsidiaries or affiliates shall not have more than 1 representative. Two persons shall be chosen from the general public.

(2) The 6 members of the advisory board chosen from the oil and gas industry shall ~~be~~ selected with special reference to their training, experience, and standing as oil or gas producers or operators, or as managing agents or representatives of oil or gas producers or operators. Each member of the board shall have at least 5 years of practical or technical experience as a producer or operator or as managing agent or representative of oil producers or operators and shall be a resident of the state at the time of appointment and throughout the period of the member's membership on the board.

(3) The term of a member of the advisory board shall be for 3 years. Of the first 6 members selected, 2 shall serve for I year, 2 for 2 years, and 2 for 3 years. At the initial selection of the 2 public members, 1 shall be appointed for a l-year term and 1 shall be appointed for a 2-year term. The supervisor, after conference with and recommendations by oil add gas producers, and operators or their managing agents or

representatives, shall fill a vacancy occurring in the membership of the advisory board subject to the approval of the commission, and may remove a member of the advisory board for good cause, except for political reasons or causes, after a full public hearing and approval by the commission. A member of the board, unless removed in the manner provided for in this subsection, shall serve until the appointment and qualification of a successor.

(4) A member of the board shall qualify by taking and subscribing to the constitutional oath of office and by filing the oath in the office of the secretary of state. The board, after having qualified, shall immediately, and annually thereafter, meet at the office of the supervisor of wells in Lansing and organize by electing a chairperson and a vice-chairperson. Four members of the board shall constitute a quorum for the transaction of business. The board shall hold at least I meeting each month, and other meetings as it may consider necessary upon notice as required under this act. Meetings shall be held at the office of the supervisor of wells at Lansing, or at another place in this state as fixed by the board or the supervisor. Meetings shall be called by the chairperson, or in the chairperson's absence by the vice-chairperson, by a majority of the members of the board, or by the supervisor.

(5) The business which the advisory board may perform shall be conducted at a public meeting of the board held in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of a meeting of the board shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

(6) In addition to the powers and duties of the board which are specifically in this act when requested by the commission or the supervisor, the board shall consult and advise with the commission or the supervisor, and shall perform other duties as may be lawfully delegated to it by the supervisor, in the administration of this act. The board may participate officially in all public hearings provided for in this act, and, upon request being made by the board, may consult promptly with the supervisor with respect to the rule or order, which should be made in view of the hearing.

(7) The board, at all reasonable times, shall have access to office records, documents, and orders of the supervisor excepting records as are provided in section 6(d)[1] and shall be kept informed by bulletins or otherwise agreed plan as to the conduct of the supervisor relative to the enforcement of this act. A writing prepared, owned, used, in the possession of, or retained by the board in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(8) The commission of natural resources shall act as an appeal board. When the advisory board or a producer or owner considers a rule, order, action, inaction, or procedure as proposed, initiated, or made by the supervisor to be burdensome, inequitable, unreasonable, or unwarranted, the board, producer, or owner may appeal to the appeal board for relief from the rule, order, action, inaction, or procedure, while giving notice to the supervisor. The chairperson of the commission shall set a date and place to hear the appeal, which may be at a regular or special meeting of the

commission called for the purpose.

(9) The action of the appeal board shall be final with respect to an appeal by the advisory board. A person may seek relief in the courts as provided elsewhere in this act, and the taking of an appeal as provided in this act shall not be a prerequisite to seeking relief in the courts.

(10) The supervisor and employees, in addition to their salaries, shall receive their reasonable expenses while away from their homes traveling on business connected with their duties. A member of the board and of the appeal board shall not receive compensation, however, a member shall be entitled to reasonable expenses while traveling in the performance of a duty imposed by this act. Salaries and expenses authorized in this act shall be paid out of the state treasury in the same manner as the salaries and expenses of other officers and employees of the department of natural resources are paid.

(11) The department of management and budget shall furnish suitable offices for the use of the supervisor, the board, and the employees.

Section 319.6(d).

* * *

319.4. Waste prohibited

Sec. 4. It shall be unlawful for any person to commit waste in the exploration for or in the development, production, or handling or use of oil or gas; or in the handling of any product thereof.

* * *

319.5. Supervisor of wells; jurisdiction, authority; enforcement of act

Sec. 5. The supervisor shall have, and he is hereby given (a) jurisdiction and authority over the administration and enforcement of the provisions of this act and all matters relating to the prevention of waste as defined herein, and to the conservation of oil and gas in this state; and (b) jurisdiction and control of and over all persons and things necessary or proper to enforce effectively the provisions of this act and all matters relating to the prevention of waste and the conservation of oil and gas.

* * *

319.6. Prevention of waste

Sec. 6. The supervisor shall prevent the waste prohibited by this act. To that end, acting directly or through his authorized representatives, the supervisor, after consulting with the board, is specifically empowered:

(a) To make and enforce rules subject to the approval of the commission, issue orders and instructions necessary to

enforce such rules and to do whatever may be necessary with respect to the subject matter stated herein to carry out the purposes of this act, whether or not indicated, specified, or enumerated in this or any other section hereof.

(b) To collect data to make inspections, studies, and investigations, to examine such properties, leases, papers, books and records as are necessary to the purposes of this act; to examine, check, and test and gauge oil and gas wells and tanks, plants, refineries, and all means and modes of transportation and equipment, to hold hearings, to provide for the keeping of records and making of reports, and for the checking of the accuracy thereof.

(c) To require the locating, drilling, deepening, redrilling or reopening, casing, sealing, operating and plugging of wells drilled for oil and gas or for secondary recovery projects, or wells for the disposal of salt water, brine or other oil field wastes, to be done in such manner and by such means as to prevent the escape of oil or gas out of 1 stratum into another, or of water or brines into oil or gas strata; to prevent pollution, damage to or destruction of fresh water supplies including inland lakes and streams and the Great Lakes and connecting waters, and valuable brines by oil, gas or other waters, to prevent the escape of oil, gas or water into workable coal or other mineral deposits; to require the disposal of salt water and brines and oily wastes produced incidental to oil and gas operations, in such manner and by such methods and means that no unnecessary damage or danger to or destruction of surface or underground resources, to neighboring properties or rights, or to life, shall result.

(d) To require reports and maps showing locations of

all wells subject to this act, and the keeping and filing of logs, well samples, and drilling, testing, and operating records or reports. All well data and samples furnished the supervisor as required herein shall, upon written request of owner of well, be held confidential for 90 days after the completion of drilling and shall not be open to public inspection except by written consent of the owner.

(e) To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, and to prevent the premature and irregular encroachment of water, or any other kind of water encroachment, which reduces or tends to reduce the total ultimate recovery of oil or gas, or both such oil or gas, from any pool.

(f) To prevent fires or explosions.

(g) To prevent "blow-outs", "seepage", and "caving" in the sense that the conditions indicated by such terms are generally understood in the oil business.

(h) To regulate the mechanical, physical, and chemical treatment of wells.

(i) To regulate the secondary recovery methods of oil and gas, including the pulling or creating a vacuum, the introduction of gas, air, water and other substances into the producing formations.

(j) To fix the spacing of wells and to regulate the production therefrom.

(k) To require the operation of wells with efficient gas-

oil ratios and to fix such ratios.

(l) To require by written notice or citation immediate suspension of any operation or practice and the prompt correction of any condition found to exist which is causing or resulting or threatening to cause or result in waste.

(m) To require either generally, or in, or from, particular areas, certificates of clearance of tenders in connection with the transportation of oil, gas or any product thereof.

(n) To require identification of the ownership of oil and gas producing leases, properties, and wells.

(o) To make rules or orders for the classifications of wells as oil wells or gas wells; or wells drilled, or to be drilled, for secondary recovery projects, or for the disposal of salt water, brine or other oil or gas field wastes; or for the development of reservoirs for the storage of liquid or gaseous hydrocarbons, or for other means of development, extraction or production of hydrocarbons.

(p) The filing of an adequate surety, security or cash bonds of owners, producers, operators, or their authorized representatives in such reasonable form, condition, term and amount as will insure compliance with this act and with the rules or orders issued thereunder and to provide for the release thereof.

* * *

319.7. Prevention of waste; procedure; hearing by board; supervisor to promulgate rules and regulations

Sec. 7. Upon the initiative of the supervisor or the board, or upon verified complaint of any person interested in the subject matter alleging that waste is taking place or is reasonably imminent, the supervisor shall call a hearing, or direct the board to call a hearing, to determine whether or not waste is taking place or is reasonably imminent, and what action should be taken to prevent such waste. Whenever the supervisor so directs, the board shall hold a hearing and shall promptly make its findings and recommendations, and the supervisor shall promptly consider the same, promulgating such rules, regulations, or orders as he may deem necessary to prevent waste as defined herein, which he finds to exist or to be reasonably imminent.

* * *

319.8. Procedure upon hearings; supervisor to prescribe; filing of rules and orders of supervisor; certified copy in evidence; public record

Sec. 8. (1) The supervisor, after consulting with the board and considering its recommendations, shall prescribe rules of order or procedure in hearings or other proceedings before the supervisor or the board under this act. Rules or orders made by the supervisor shall be entered in full in a book to be kept for that purpose by the supervisor. A copy of a rule or order, certified by the supervisor, shall be received in evidence in the courts of this state with the same effect as the original.

(2) A writing prepared, owned, used, in the possession of, or retained by the supervisor in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246, of the Michigan Compiled Laws.

* * *

319.9. Witnesses and production of books; incriminating testimony

Sec. 9. The supervisor may, and is hereby authorized, to compel by subpoena, the attendance of witnesses, the production of books, papers, records, or articles necessary in any proceeding before him, the board, or the commission. No person shall be excused from obeying the command of any subpoena issued in any hearing or proceeding brought under the authority of this act on the ground or for the reason that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture: Provided, That nothing herein contained shall be construed as requiring any person to produce books, papers or records or to testify in response to any inquiry not pertinent to some question lawfully before such board or supervisor or commission or court for determination within the purposes of this act: Provided further, That any incriminating evidence, documentary or otherwise, shall not thereafter be used against such witness in a prosecution or action for forfeiture: Provided further, That no person testifying shall be exempted from prosecution and punishment for perjury in so testifying.

* * *

319.10. Witness; refusal to appear or testify; attachment, punishment for contempt, procedure; witness fees, payment

Sec. 10. In case of failure or refusal on the part of any person to comply with any subpoena issued by the supervisor, or on the refusal of any witness to testify or answer as to any matters regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of said supervisor, may issue an attachment for such person and compel him to comply with such subpoena and to attend before the board or supervisor and produce such documents, and give his testimony upon such matters, as may be lawfully required and such court or judge shall have the power to punish for contempt as in case of disobedience of a like subpoena issued by or from such court, or a refusal to testify therein.

Any witness summoned by subpoena or by written request of the supervisor and attending any hearing called by the supervisor shall be entitled to the same fees and mileage as are or may be provided by law for attending the circuit court in any civil matter or proceeding. The fees and mileage of witnesses subpoenaed at the instance of the supervisor or the board shall be paid out of the general funds of the state treasury upon proper voucher approved by the supervisor. The fees and mileage of witnesses subpoenaed at the instance of any other interested parties shall be paid by such other parties.

* * *

319.11. Perjury, false swearing deemed

Sec. 11. If any person of whom an oath shall be required under the provisions of this act, or by any rule, regulation or order of the supervisor, shall wilfully swear falsely in regard to any matter or thing respecting which such oath is required, or shall wilfully make any false affidavit required or authorized by the provisions of this act, or by any rule, regulation or order of the supervisors, such person shall be deemed guilty of perjury and shall be punished by imprisonment in the state penitentiary for not more than 5 years nor less than 6 months.

* * *

319.12. Apportionment of allowable production between wells: basis

Sec. 12. When, to prevent waste, the supervisor limits the amount of oil or gas to be produced from any well, pool or field in this state, he shall, after consulting with the board and considering its recommendations, allocate or distribute the allowable production in any such field or pool. Such determination or distribution in such field or pool shall be made on a reasonable basis, giving, if reasonable, under all circumstances, to each small well of settled production in such pool or field, an allowable production which will prevent a general or premature abandonment of the wells in such pool or field.

* * *

319.13. Apportionment of allowable production, basis

Sec. 13. When, to prevent waste, the total allowable production for any oil or gas field or pool in the state is fixed in an amount less than that which the field or pool could produce if no restriction were imposed, the supervisor, after consulting with the board and considering its recommendations, shall prorate or distribute on a reasonable basis the allowable production among the producing wells in the field or pool, so as to prevent or minimize reasonably avoidable drainage from each developed area which is not equalized by counter drainage. The rules or orders of the supervisor shall, so far as it is practicable to do so, afford the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas in the pool, being an amount, so far as can be practicably determined and obtained without waste, and without reducing the bottom hole pressure materially below the average for the pool, substantially in the proportion that the quantity of the recoverable oil or gas under such property bears to the total recoverable oil or gas in the pool, and for this purpose to use his just and equitable share of the reservoir energy: Provided, That a well in a pool producing from an average depth of 1,000 feet or less, shall, on the basis of a full drilling unit as may be established under this section, be given a base allowable production of at least 100 barrels of oil per well per week; for a well in a pool producing from an average depth greater than 1,000 feet, the base allowable production shall be increased 10 barrels per well per week for each addition[1] 100

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[1] So in enrolled bill; probably should read "additional".

feet of depth greater than 1,000 feet: Provided further, That such allowable production is or can be made without surface or underground waste.

To prevent the drilling of unnecessary wells the supervisor, after conference with and recommendation by the board, may fix a drilling unit for each pool. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by 1 well and such unit shall constitute a developed area as long as a well is located thereon which is capable of producing the economically recoverable oil or gas thereunder. Each well permitted to be drilled upon any drilling unit shall be located in the approximate center thereof, or at such other location thereon as may be necessary to conform to a uniform well spacing pattern as adopted and promulgated by the supervisor after due notice and public hearing, as provided in this act.

The drilling of unnecessary wells is hereby declared waste as such wells create fire and other hazards conducive to waste, and unnecessarily increase the production cost of oil and gas to the operator, and thus also unnecessarily increase the cost of the products to the ultimate consumer.

The pooling of properties or parts thereof shall be permitted, and, if not agreed upon, the supervisor after conference with and recommendations by the board, may require such pooling in any case when and to the extent that the smallness or shape of a separately owned tract or tracts would, under the enforcement of a uniform spacing plan or proration or drilling unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover or receive his just and equitable share of the oil or gas and gas

energy in the pool. The owner of any tract that is smaller than the drilling unit established for the field, shall not be deprived of the right to drill on and produce from such tract, if same can be done without waste, but in such case, the allowable production therefrom as compared with the allowable production of such tract were a full unit, shall be in the ratio of the area of such tract to the area of a full unit, except as a smaller ratio may be required to maintain average bottom hole pressures in the pool, to reduce the production of salt water, or to reduce an excessive gas-oil ratio. All orders requiring such pooling shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract in the pooling plan the opportunity to recover or receive his just and equitable share of the oil or gas and gas energy in the pool as above provided, and without unnecessary expense, and will prevent or minimize reasonably avoidable drainage from each developed tract which is not equalized by counter drainage. The portion of the production allocated to the owner of each tract included in a drilling unit formed by voluntary agreement or by a pooling order shall, when produced, be considered as if it had been produced from such tract by a well drilled thereon.

Each well permitted to be drilled upon any drilling unit or tract shall be drilled at a location which conforms to the uniform well spacing pattern with such exception as may be reasonably necessary where it is shown, after notice and upon hearing and the supervisor finds that the unit is partly outside the pool, or for some other reason, a well at such location would be unproductive, or that the owner or owners of a tract or tracts covering that part of the drilling unit or tract on which said well would be located if it conformed to the uniform well spacing pattern refuses to permit drilling at the

regular location, or where topographical or other conditions are such as to make drilling at the regular location unduly burdensome or imminently threatening to water or other natural resources, or property or life.

When any exception is granted the supervisor shall take such action as will offset any advantage which the person securing the exception may have over other producers in the pool by reason of the drilling of the well as an exception, and so that drainage from the developed areas to the tract with respect to the exception granted will be prevented or minimized and the producer of the well drilled as an exception will be allowed to produce no more than his just and equitable share of the oil or gas in the pool as such share is set forth herein, and to that end the rules and orders of the supervisor shall be such as will prevent or minimize reasonably avoidable drainage from each developed area which is not equalized by counter drainage and will give to each producer the opportunity to use his just and equitable share of the reservoir energy.

Minimum allowable for some wells and pools may be advisable from time to time, especially with respect to wells and pools already drilled when this act takes effect, to the end that the production will repay reasonable lifting costs and thus prevent premature abandonment of wells and resulting wastes.

After the effective date of any rule or order made by the supervisor in accordance with and under the provisions of this act fixing the allowable production, no person shall produce more than the allowable production applicable to him, his wells, leases or properties, and the allowable production shall be produced in accordance with such

applicable rules or orders.

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319.14. Certificates of clearance or tender

Sec. 14. The supervisor shall have authority to issue certificates of clearance or tenders whenever the same may be required to effectuate the purposes of this act.

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319.15. Illegal oil or gas, handling or disposition prohibited, penalty or forfeiture

Sec. 15. It shall be unlawful for any person to sell, purchase, acquire, transport, refine, process or otherwise handle or dispose of any illegal oil or gas in whole or in part, or any illegal product of oil or gas. A penalty or forfeiture shall not be imposed on account of any such act until certificates of clearance or tenders have been required by the supervisor as provided in section 14.[1]

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319.16. Public hearings to be held before adoption of rules, regulations or orders except emergency orders; notice of hearing

Sec. 16. No rules, regulations or orders shall be made,

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[1] Section 319.14.

promulgated, put into effect, revoked, changed, renewed or extended except emergency orders hereinafter provided for until and unless public hearings shall be held thereon. Public hearings shall be held at such time, place and manner and upon such notice, not less than 10 days, as shall be prescribed by general order and rules adopted in conformity with this act. The supervisor shall have authority to promulgate and put in effect emergency rules, regulations or orders without a public hearing that may be necessary to carry out the provisions of this act: Provided, That such emergency rules, regulations and orders shall in no event remain in force and effect more than 21 days.

* * *

319.17. Actions against supervisor or commission; Ingham county circuit court, jurisdiction; injunction or restraining order only after hearing

Sec. 17. The circuit court of Ingham county shall have exclusive jurisdiction of all suits brought against the commission, the supervisor, the board or any agent or employee thereof, by or on account of any matter or thing arising under the provisions of this act. No temporary restraining order or injunction shall be granted in any such suit except after due notice and for good cause shown.

* * *

319.18. Enforcement of act and rules, procedure, parties

Sec. 18. (1) The supervisor may proceed at law or for the enforcement of this act and a rule promulgated under this act or for the prevention of the violation of this act or a rule promulgated pursuant to this act, and the attorney general shall represent the supervisor in an action brought under this act. The supervisor or an assistant appointed by the supervisor may make complaint and cause proceedings to be commenced against a person for a violation of this act without the sanction of the prosecuting attorney of the county in which the proceeding is commenced. The supervisor or an assistant of the supervisor may appear for the people in a court of competent jurisdiction in a case for a violation of this act or a rule promulgated pursuant to this act, and prosecute the violation in the same manner and with the same authority as the prosecuting attorney of a county in which the proceeding is commenced, and may sign vouchers for the payment Of fees and do all other things required in the same manner and with the same authority as the prosecuting attorney.

(2) Subsection (1) shall not apply to a violation of this act which is subject to the penalty prescribed pursuant to section 20(3) or (4).[1]

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319.18a. Failure to obtain permit or properly construct, operate, maintain, case, plug, or repair well; notice of determination; liability; claims

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[1] Section 319.20(3) or (4).

Sec. 18a. When the supervisor determines that the owner or operator of a well subject to this act has failed or neglected to properly obtain a permit, construct, operate, maintain, case, plug, or repair the same in accordance with the provisions of this act or the rules promulgated thereunder, the supervisor shall give notice of such determination, in writing, to the owner, operator and to the surety executing the bond filed with the supervisor by the owner or operator in connection with the issuance of the permit authorizing the drilling of a well. This notice of determination may be served upon the owner or operator and surety in person or by registered mail. If the owner or operator cannot be found m the state, the mailing of the notice of determination to the owner or operator at his last known post office address by registered mail shall constitute service of same. If the owner or operator, or surety, fails or neglects to properly case, plug, or repair the well described in the notice of determination herein provided for within 30 days of the date of service or mailing of the notice, the supervisor may enter into and upon any private or public property on which the well is located and upon and across any private or public property necessary to reach the well, and case plug, or repair the well, and the owner or operator and surety shall be jointly and severally liable for all expenses incurred by the supervisor in doing same. The supervisor, acting for and in behalf of the state, shall certify in writing to the owner or operator and surety the claim of the state in the same manner herein provided for the service of the notice of determination, and shall list thereon the items of expense incurred in casing, plugging, or repairing the well. The claim shall be paid by the owner or operator, or surety, within 30 days, and if not paid within that time the supervisor, acting for and in behalf of the state, may bring suit against the owner or operator, or surety, jointly or

severally, for the collection of same in any court of competent jurisdiction in the county of Ingham.

* * *

319.18b. Violations including failure to properly plug abandoned well, penalties; owner or operator, liability

Sec. 18b. A person who abandons a well without properly plugging the well in accordance with this act or the rules promulgated under this act, or except as provided in section 20(3) or (4),[1] who violates this act or a rule promulgated under this act, whether as principal, agent, servant, or employee, is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 and costs of prosecution, or imprisonment for not more than 90 days, or both. This shall not impose liability upon the owner of land upon which a well is located, unless the property owner is the owner or part owner of the well. The words "owner or operator", as used in section 18a[2] mean a person who, by the terms of this act and the rules promulgated under this act, is responsible for the plugging of a well.

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319.19. Falsification, omission, or removal of records, reports, or memoranda; penalty

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[1] Section 319.20(3) or (4).

[2] Section 319.18a.

Sec. 19. (1) A person who, for the purpose of evading this act, or of evading a rule or order made under this act, intentionally makes or causes to be made, false entry or statement of fact in a report required by this act or by a rule or order made under this act, or who, for that purpose, makes or causes to be made false entry in an account, record, or memorandum kept by a person in connection with this act, or of a rule or order made under this act; or who, for that purpose, omits to make, or causes to be omitted, full, true, and correct entries in the accounts, records, or memoranda, of all facts and transactions pertaining to the interest or activities in the petroleum industry of that person as may be required by the supervisor under authority given in this act or by any rule or order made under this act; is guilty of a felony punishable by a fine of not more than $3,000.00, or imprisonment for not more than 3 years, or both.

(2) A person who for the purpose of evading this act or a rule or order made pursuant to this act removes from the jurisdiction of the state, or mutilates, alters or by other means falsifies a book, record, or other paper pertaining to transactions regulated by this act shall be subject to the penalties prescribed in Act No. 442 of the Public Acts of 1976.[1]

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319.20. Civil penalty; enforcement

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[1] Section 15.231 et seq.

Sec. 20. (1) Except when a penalty is otherwise provided for in this act, a person who violates this act or a rule or order promulgated or issued under this act shall be subject to a penalty of not more than $1,000.00. Each day the violation continues shall constitute a separate offense. The penalty shall be recovered by an action brought by the supervisor.

(2) A person aiding in the violation of this act, or a rule or order promulgated or issued under this act, shall be subject to the same penalties as are prescribed in this section for the person who committed the violation.

(3) A member of the advisory board created in section 3 who intentionally violates section 3(5)[1] shall be subject to the penalties prescribed in Act No. 267 of the Public Acts of 1976.[2]

(4) If the advisory board created in section 3 arbitrarily and capriciously violates section 3(7)[3] or if the supervisor arbitrarily and capriciously violates section 8(2)[4] the advisory board or supervisor shall be subject to the penalties prescribed in Act No. 442 of the Public Acts of

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[1] Section 319.3(5).

[2] Section 15.261 et seq.

[3] Section 319.3(7).

[4] Section 319.8(2).

1976.[5]

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319.21. Illegal oil or gas; seizure, confiscation, notice, intervention

Sec. 21. All illegal oil or gas and products derived from illegal oil or gas and conveyances used in the transportation thereof and containers used in the storage thereof except railroad tank cars and pipe lines shall be subject to confiscation and the supervisor is hereby empowered and authorized to seize such illegal oil or gas, oil or gas products, conveyances and containers. The supervisor shall immediately upon such seizure institute a proceeding in rem to confiscate the oil or gas, oil or gas products, conveyances and containers in the circuit court of the county in which the seizure was made or in the circuit court of Ingham county. Upon commencement of such proceedings the notice shall be given to all known interested persons in the manner as the court shall direct. The court, upon finding that the oil or gas or the products or the conveyances or containers so seized are illegal as herein defined, shall order the same to be sold under such terms and conditions as it may direct. Any person claiming an interest in any oil or gas or product or conveyance or container so seized shall have the right to intervene in the proceedings and the rights of such person shall be determined by the court as justice may require.

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[5] Section 15.231 et seq.

319.22. Fee for monitoring, surveillance, enforcement, and administration of act

Sec. 22. (1) For the purpose of monitoring, surveillance, enforcement and administration of this act, a fee not in excess of 1%, based on the gross cash market value is levied upon all oil and gas produced in this state. The fee shall be collected by the revenue division of the department of treasury in the same manner, at the same time and subject to all the provisions of the tax levied by Act No. 48 of the Public Acts of 1929, [1] being sections 205.301 to 205.317 of the Compiled Laws of 1970.

(2) The fee shall be computed as follows:

(a) The state budget director shall on or before October 1 certify to the department of treasury the amount appropriated for that fiscal year for the purpose of monitoring, surveillance, enforcement and administration of this act.

(b) The department of treasury shall determine, on or before November I of that year, the percentage, to the nearest 1/10 of 1%, the ratio that the appropriation bears to the total gross cash market value of the oil and gas produced in this state during the fiscal year ending the prior June 30.

(c) The percentage so determined, but in no event in excess of 1% shall be the fee beginning the first of the following month and will continue to be, the fee for the next

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[1] Section 205.301 et seq.

12 months and until a different fee is determined.

(3) The proceeds of the fee shall be credited to the general fund and appropriated by the legislature towards the cost of monitoring, surveillance, enforcement and administration of this act.

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319.23. Permit to drill well; application, posting, fee, issuance

Sec. 23. A person shall not drill or begin the drilling of any well for oil or gas, for secondary recovery, or a well for the disposal of salt water, or brine produced in association with oil or gas operations or other oil field wastes, or wells for the development of reservoirs for the storage of liquid or gaseous hydrocarbons, until the owner directly or through his authorized representatives shall have first made a written application to drill any such well and filed with the supervisor a bond as provided in section 6,[1] and received and posted in a conspicuous place at the location of the well a permit in accordance with the rules and requirements or orders made and promulgated by the supervisor. A fee of $100.00 shall be charged for a permit to drill a well subject to this act. Upon receiving and accepting a written application and payment of the fee required, the supervisor shall within 10 days thereafter issue to any owner or his authorized representative, a permit to drill. A permit to drill shall not be issued to any owner or his authorized representative who does not comply with the

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[1] Section 319.6.

rules and requirements or orders made and promulgated by the supervisor. A permit shall not be issued to any owner or his authorized representative who has not complied with or is in violation of this act, or any of the rules, requirements or orders issued by the supervisor, or the department of natural resources.

The supervisor shall thereupon pay such permit fee into the state treasury and it shall there be credited to the general fund of the state.

* * *

319.24. Cumulative with existing laws; repeal of conflicting provisions

Sec. 24. This act shall be cumulative of all existing laws on the subject matter, but, in case of conflict, this act shall control and shall repeal such conflicting provisions, except for the authority given the public service commission in sections 7 and 8 of Act No. 9 of the Public Acts of 1929, as amended, being sections 483.107 and 483.108 of the Michigan Compiled Laws.

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Sec. 25, P.A.1939, No. 61

This section was a severability clause. It was repealed by P.A.1945, No. 267, Imd. Eff. May 25.

319.26. Repealed by P.A.1961, No. 131, § 2, Eff. Sept. 8 Historical Note

The repealed section, derived from P.A. 1939, No. 61, § 26, provided for drilling of wildcat wells.

319.27. Applicability of act

Sec. 27. The provisions of this act shall not apply to drill holes for the exploration and the extraction of iron, copper, or brine, to water wells to mine and quarry drill and blast holes, nor to coal test holes, nor to seismograph or other geophysical exploration test holes.

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APPENDIX N

Michigan Oil and Gas Severance Tax Act

MICHIGAN OIL AND GAS SEVERANCE TAX ACT
P.A. 1929, No. 48, Eff. Aug. 28

AN ACT levying a specific tax to be known as the severance tax upon all producers engaged in the business of severing oil and gas from the soil; prescribing the method of collecting the tax; requiring all producers of such products or purchasers thereof to make reports; to provide penalties; to provide exemptions and refunds; to prescribe the disposition of the funds so collected; and to exempt those paying such specific tax from certain other taxes. Amended by P.A. 1965, No. 299, Imd. Eff. July 22.

The People of the State of Michigan enact:

205.301. Severance tax on oil or gas

Sec. 1. There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax.

205.302. Monthly reports; contents, form

Sec. 2. (1) Every corporation, association, person, common carrier, pipe line company or common purchaser,

who shall receive or purchase or transport any such oil or gas, shall make a report on or before the twenty-fifth day of each month in the form and manner required by the department of revenue, showing the total amount of such oil and gas received, purchased, stored or transported during the preceding month, and the actual market value thereof at the time it is received, purchased, stored or transported, and such other information as may be required by the department.

(2) Each producer, when requested by the department, shall file such report in the form and manner required by the department.

205.303. Tax rate; computation; payor; withholding and payment

Sec. 3. (1) Except as provided in subsection (2), the severance tax required to be paid by each producer at the time of rendering each monthly report, or by a pipeline company, common carrier, or common purchaser, for and on behalf of a producer, shall be in the amount of 5% of the gross cash market value of the total production of gas or 6.6% of the gross cash market value of the total production of oil during the preceding monthly period, exclusive of the production or proceeds from the production attributable to the state, the government of the United States, or a political subdivision of the state or government of the United States. The value of all production shall be computed as of the time when and at the place where the production was severed or taken from the soil immediately after the severance. Except as otherwise provided in this section, the payment of the severance tax shall be required of each producer. If the production is sold or delivered to a pipeline company and is transported by the

pipeline company through lines connected with the oil or gas well of the owner, or of a common purchaser, the pipeline company, or common purchaser shall receive and accept all the oil and gas, subject to a lien as prescribed in section 8[1] and the pipeline company shall withhold out of the proceeds or price to be paid for the products severed, the proportionate parts of the tax due by the respective owners of the oil and gas at the time of severance and, at the time required for the filing of the monthly reports required in section 2[2], shall pay to the department of revenue all the tax money so collected or withheld. Each pipeline company, common carrier, or common purchaser shall deduct from the purchase price to a producer from whom it may receive the oil or gas the amount of the severance tax levied in this section before making the payment. If under the terms of a contract the pipeline company, common carrier, or common purchaser shall be required to reimburse a producer of oil or gas for the amount of the severance tax or a part thereof, the tax reimbursement shall not be considered a part of the gross cash market value of the total production of the oil or gas.

(2) The severance tax required to be paid by each producer at the time of rendering each monthly report, or by a pipeline company, common carrier, or common purchaser, for and on behalf of a producer, on stripper well crude oil, as defined in section 8 of the emergency petroleum allocation act of 1973, 15 U.S.C. 757 and on crude oil from marginal properties as defined in part 212, subpart D, of chapter II of title 10 of the code of federal regulations 10 CFR 212.72 to

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[1] Section 205.308.

[2] Section 205.302.

212.77, shall be in the amount of 4% of the gross cash market value of the total production of the oil, during the preceding monthly period, exclusive of the production or proceeds from the production attributable to the state, the government of the United States, or a political subdivision of the state or government of the United States. The value of all production shall be computed as of the time when and at the place where the production was severed or taken from the soil immediately after the severance.

205.304. Production record, keeping, open to inspection; penalty

Sec. 4. Each corporation, association or person mentioned and included in sections 1 and 2 of this act[1] shall make, keep and preserve a full and complete record of all such oil produced in this state during the time so engaged in its production, and said record shall be open at all times to the inspection of the Michigan tax commission. Any corporation, association or person failing to comply with this requirement shall be subject to a penalty of not less than 500 and not more than 1,500 dollars payable to the state of Michigan, and such penalty shall accrue for each 20 days of failure to comply with this section with reference to each separate oil or gas well.

205.305. Report, contents

Sec. 5. In each report required to be made by this act, such corporation, association or person making the same shall show in detail the disposition made of any such oil or gas.

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[1] Sections 205.301 and 205.302.

Said report shall show to whom any such oil or gas was sold or delivered to each, and shall show the name and location of the person, refinery, pipe line establishment, plant, factory, railroad, institution or place to which or to whom delivery was made.

205.306. Administration; rules; deficiency, interest, or penalty; limitations

Sec. 6. (1) The tax imposed by this act shall be administered by the revenue commissioner of the department of treasury, under Act No. 122 of the Public Acts of 1941, as amended, being sections 205.1 to 205.19 of the Michigan Compiled Laws, and this act. In case of conflict between Act No. 122 of the Public Acts of 1941, as amended, and this act. the provisions of this act shall prevail.

(2) Rules shall be promulgated under this act pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

(3) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or the date the return was filed, whichever is later. The taxpayer shall not claim refund of any amount paid to the department after the expiration of 4 years after the date of the payment. A taxpayer shall not assign a claim against the state to any other person. If a person subject to tax under this act fraudulently conceals any liability for the tax or a part of the tax, the commissioner, upon discovery of the fraud and within 2 years thereafter, shall proceed to assess the tax with penalties and interest as provided, computed from the date on which the tax liability

originally accrued and the tax, penalties, and interest shall become due and payable after notice and hearing as provided.

(4) The running of the statute of limitations shall be suspended for:

(a) The period pending a final determination of tax after issuance of a notice of intent.

(b) A period which the taxpayer and the commissioner consent to in writing.

Amended by P.A.1980, No. 166, § 1, Eff. Sept. 17.

205.307 to 205.309. Repealed by P.A.1980, No. 166, § 2, Eff. Sept. 17

205.310. Injunction

Sec. 10. Upon a bill being filed under the direction of the attorney general in the circuit court for the county of Ingham. that court shall have power to restrain by injunction. any corporation, association or person who has failed to comply with any of the provisions of this act and in the same manner to restrain any corporation, association or person from continuing to produce oil or gas while delinquent in the filing of any report or the paying of any tax, penalty or cost required under the provisions of this act.

205.311. Oil defined

Sec. 11. The word "oil" as used in this law means petroleum oil, mineral oil or other oil taken from the earth.

205.312. Persons, producers; defined

Sec. 12. (1) "Person" as used in this act shall include any person, firm, concern, receiver, receivers, trustee, executor, administrator, agent, institution, association, partnership, company, corporations, and persons acting under declarations of trust.

(2) "Producer" as used in this act means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance.

205.313. Receipt, contents

Sec. 13. Any corporation, association or person paying any tax, penalty or cost under the provisions of this act, to the state tax commission shall be entitled to a receipt for the same, showing the time of payment and the purpose for which paid.

205.314. Severance taxes to accompany report; general fund

Sec. 14. (1) All taxes shall accompany the report provided for in section 2.[1] Except as provided in subsection (2), all taxes, penalties, or costs paid to the state tax commission under this act shall be paid into the state treasury and shall be credited to the general fund of the state where they shall be available for any purpose for any purpose for which

---

[1] Section 205.302.

the general fund is made available by law.

(2) The revenue collected under subsection (1) in excess of $16,000,000.00, shall be deposited in the general fund and shall be allocated for the payment of credits for heating fuel costs provided under section 527a of Act No. 281 of the Public Acts of 1967, being section 206,527a of the Michigan Compiled Laws, for the fiscal year ending September 30, 1980 only.

205.315. Severance tax in lieu of other taxes; exceptions

Sec. 15. The severance tax herein provided for shall be in lieu of all other taxes, state or local, upon the oil or gas, the property fights attached thereto or inherent therein, or the values created thereby; upon all leases or the fights to develop and operate any lands of this state for oil or gas, the values created thereby and the property fights attached to or inherent therein: Provided, however, Nothing herein contained shall in anywise exempt the machinery, appliances, pipe lines, tanks and other equipment used in the development or operation of said leases, or used to transmit or transport the said oil or gas: And provided, further, That nothing herein contained shall in anywise relieve any corporation or association from the payment of any franchise or privilege taxes required by the provisions of the state corporation laws.

205.316. Repealed by P.A.1980, No. 166, § 2, Eff. Sept. 17

205.317. Information as to production; availability, conditions

Sec. 17. The department of revenue may provide information to any person as to the quantities of oil or gas purchased or reported when the department is satisfied that the information will be used for public or petroleum industry educational or research purposes.

APPENDIX O

Opinion of Attorney General 1963-'64 No. 4160

OPINION OF ATTORNEY GENERAL
1963-'64 No. 4160
BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1964

FRANK J. KELLEY
ATTORNEY GENERAL

AUTHORITY

Opinion of Attorney General 1963-'64 No. 4160

CONSERVATION DEPARTMENT: Oil and Gas Leases.
OIL AND GAS: Severance and Privilege Taxes.
LEASES: Shifting of Tax Burden.
TAXATION: Severance and Privilege Taxes.

State of Michigan Conservation Department oil and gas leases make no provision for shifting of the tax burden as to severance and privilege taxes to the State for the 1/8 of the oil specified as royalty.

Severance and privilege taxes are the primary liability of the producers of off and they must pay these taxes on the entire amount of the oil produced and may not deduct 1/8 of these taxes from the State's royalty in the absence of statutory authority.

A division order cannot make the State of Michigan liable for severance and privilege taxes when these, by statute, are made the primary responsibility of the producer.

The State of Michigan is entitled to receive full 1/8 royalty under its lease without deduction for any taxes.

No. 4160 June 17, 1963.

Mr. Gerald E. Eddy, Director
Department of Conservation
Mason Building
Lansing, Michigan

This is in response to your letter of March 13, 1963. You indicate that questions have been raised by State auditors concerning the State's royalty interest in oil and gas under

State leases. The questions concern the industry practice of withholding a severance tax of 2% of the gross each market value of the product[1] and of a privilege tax of 1/8 of 1¢ per barrel of crude oil[2] from proceeds paid to the State. You ask whether these taxes are rightfully imposed on the State's proportionate share of all oil and gas produced and sold, and as to the legality of imposing a tax on the state's share of production.

Enclosures submitted are State of Michigan lease form and Division Order form.

Act 48, P.A. 1929, Sec. 1,[3] provides in part as follows:

> "There is hereby levied upon each corporation, association, or person engaged in the business of severing from the soil oil or gas, a specific lax to he known as the severance tax. * * *"

It would appear from the above quoted statute that the producer or the party engaged in withdrawing the oil and separating it from the ground is the party upon whom the severance tax is levied. In other words, this is a specific tax.

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[1] Act 48, P.A. 1929, M.S.A. Sec. 7.351, C.L. 1948, Sec. 205.301 et seq.

[2] Act 61, P.A. 1939, as amended, M.S.A. Sec. 13.139(22), C.L. 1948, Sec. 319.22.

[3] C.L. 1948, Sec. 205.301 et seq.; M.S.A. 7.351.

Section 3[4] of the act provides in part:

> "The severance tax required to be paid by each producer at the time of rendering each monthly report, or by any pipe line company, common carrier or common purchaser, for and on behalf of any such producer, shall be in the amount of two (2) per cent of the gross cash market value of the total production of such oil or gas during the preceding monthly period. The value of all such production shall be computed as of the time when and at the place where the same have been severed or taken from the soil immediately after such severance. Except as otherwise provided in this section, the payment of said severance tax shall be required of the severor or producer actually engaged in the operation of severing the oil or gas.* * *"

A privilege tax is imposed by Act 61, P.A. 1939[5] and provides as follows:

> "A privilege fee of one-eighth (1/8) of 1 cent per barrel shall be paid upon oil produced in Michigan and sold. This fee shall be levied and collected by the Michigan tax commission in the same manner as provialed in and by Act No. 48 of the Public Acts of 1929, of the state of Michigan. All moneys received from this source shall be turned in to the general fund of the state."

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[4] M.S.A. 7.353; '48 C.L. 205.303.

[5] C.L. 1948, Sec. 319.22; M.S.A. 13.139(22).

We will first consider the industry practice of withholding a severance tax of the gross cash market value of the product. Our research discloses that a number of oil and gas producing States have enacted statutes levying production, severing, occupation, privilege and distribution taxes on gross productions of oil and gas. Examination of the work entitled "Summers on Oil and Gas," Section 801, page 410 indicates that the practice varies as to who bears the tax and he says as follows:

> "* * * In some states the burden of the tax is borne by the lessee and royalty owner proportionately, but in others it is borne by the lessee or producer alone. In some states such taxes are in lieu of property taxes, but in others they are additional taxes."

The Michigan acts levying the severance and privilege taxes have not been judicially construed.

Examination of the State of Michigan lease furnishes no indication that the taxes imposed by the above statute are to be borne by the State of Michigan. The State of Michigan lease makes the following provisions for payment of royalty:

> "F(1a). To deliver to the credit of the Lessor herein, free of cost in tank car, or pipe line to which Lessee may connect its well or wells, the equal one-eighth part of all oil produced and saved from the leased premises described above and listed in Schedule __ or at the option of the Lessor, Lessee shall pay the value thereof in cash at the prevailing market price of oil of same grade and quality at that time and place.

> "(2) Should gas and oil both be found in any well, the Lessee shah pay to the Lessor for gas produced and sold from any such oil well, as royalty, one-eighth of the value thereof in cash at the prevailing market price in the field where produced. If such gas is used by the Lessee for the production of casinghead gasoline, the royalty shall be one-eighth of the gross proceeds received from the sale of such casinghead gasoline and one-eighth of the gross proceeds received from the sale of gas from which the casinghead gasoline has been extracted; provided further that the Lessor shall receive as royalty one-eighth of the gross proceeds of the sale of drip gasoline and natural gasoline recovered from the gas produced from leased premises."

No arrangement is made in any of the clauses contained in the lease for the shifting of the tax burden on the 1/8 royalty interest of the State.

You have furnished us with a copy of a typical Division Order entered into by an oil company and the Department of Conservation. This Division Order makes a provision for payment of taxes in paragraph 6 which reads as follows:

> "6. You are hereby authorized at your election to withhold from the proceeds accruing hereunder to any of the undersigned the amount of any severance, production, occupation or other tax levied against him by or under authority of the laws of the United States and of the State of Michigan for and on account of his interest in said oil, land or lease and to pay such tax or

taxes with the withheld proceeds."

We do not consider that this Division Order can impose any tax liability where none exists. A Division Order is entered into for the purpose of separating the various interests and to determine how payments shall be made in satisfaction of royalties. The agreement between the Lessor and Lessee is contained in the lease and determines the various liabilities. A lease is not affected by the Division Order. *Stanolind Oil & Gas Co. v. Terrell,* (Tex.), 183 S.W. 2d 743.

Under the Michigan acts, the privilege tax is imposed upon the severor or producer. There is authority to the effect that by statute or by agreement the shifting of this tax can be made to the Lessor. However, that is not the situation here. The lease with the State of Michigan does not provide for the assumption of the tax burden by the State of Michigan and if it did, such a provision would be invalid in the absence of statutes permitting the same.

The General Property Tax Law provides in part:[6]

> "Property exempt from taxation.] Sec. 7. The following property shall be exempt from taxation:
> * * *
> State property.] Second, All public property belonging to the state of Michigan, except licensed homestead lands, part-paid lands held under certificates, and lands purchased at tax sales, and still held by the

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[6] M.S.A. § 7.7; 1948 C.L. § 221.7.

state;"

In the case of *Ryerson v. Township of Laketon,*[7] it is stated:

> "When a tax is levied for any purpose, it must have express warrant of law to authorize its imposition."

and in *People v. Ingalls*, [8] it is stated:

> "The doctrine has been pretty well settled in this State and elsewhere that property owned by the State or by the United States is not subject to taxation unless so provided by positive legislation. * * *"

I am of the opinion that the State's 1/8 royalty interest is due and payable to the State of Michigan without any withholding for severance or privilege taxes.

FRANK J. KELLEY,
Attorney General.

* * *

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[7] 52 Mich. 509, 517.

[8] 238 Mich. 423, 425. See also: *Wyandotte v. State Board*, 278 Mich. 47; O.A.G. 1959-1960, Vol 1, pp. 201, 202, No. 3437; O.A.G. 1961-1962, pp. 597, 598, No. 4095.

APPENDIX P

EXHIBITS TO APPENDIX K

(CASE NO. 93-10714-CK

COMPLAINT WITH JURY DEMAND)

LIBER 291 PAGE 178

ASSIGNMENT OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS THAT J.L. ORR, of 6806 SOUTH COOK WAY, LITTLETON COLORADO, HEREINAFTER DESIGNATED ASSIGNOR, JOINED HEREIN BY HIS WIFE, BARBARA A. ORR FOR AND IN CONSIDERATION OF ONE DOLLAR AND OTHER GOOD AND VALUABLE CONSIDERATIONS, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED DOES HEREBY SELL, ASSIGN, TRANSFER AND SET OVER UNTO SHELL OIL COMPANY, A DELAWARE CORPORATION, WITH OFFICES AT 1700 BROADWAY, DENVER, COLORADO 80202, HEREINAFTER DESIGNATED ASSIGNEE, THOSE CERTAIN OIL AND GAS LEASES IDENTIFIED TO DATE, NAMES OF LESSORS AND BOOK AND PAGE OF RECORDING IN THE RECORDS OF MANISTEE COUNTY, MICHIGAN, AS FOLLOWS, TO WIT:

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-6029-	03-25-68	FRANK KUSIBOSKI	283-431
E/2NW/4NE/4 SEC 14-22-N-16W.			
MH-6030-	03-25-68	RUSSELL HILLIARD	283-433
S/2NE/4 SEC 18-23N-14W.			

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-6031-	03-26-68	DELBERT S KELLFY	283-435

W/2NE/4 & NW/4SE/4 SEC 15-22N-15W.

MH-6096-	03-27-68	REESE A. BAGWELL	283-437

SW/4SE/4 SEC 26-23N-14W.

MH-6097-	03-27-68	FLOYD R HILLIARD	283-439

SW/4NE4 & NW/4SE/4 SEC 31-23N-14W.

MH-6098-	03-28-68	WILLIAM HILLIARD	283-441

S/2SW/4 & PT NE/4SW/4 SEC 30-23N-14W.

MH-6099-	03-27-68	FORREST HILLIARD	283-443

NE/4SW/4 & PT OF SE/4NW/4 SEC 14, FRL NW/4 OF FRL NW/4 SEC 31-23N-14W.

MH-6100-	03-28-68	WILLIAM R WELCH	283-445

NE/4SW/4, W/2SW/4 EXC PART SW/4SW/4 DESC AS

BEG AT SW/C SW/4SW/4, TH N 400 ALONG TWP LINE, TH E PARALLEL TO S SEC LINE 200 FT, TH S PARALLEL TO W SEC 400 FT TO S SEC LINE, TH W 200 FT TO POB, SEC 31-23N-152.

MH-6101- 03-27-68 CHARLES E SCHOEDEL 283-447

NE/4NE/4, E/2SE/4NE/4 SEC 7-22N-15W, SW/4SW/4 WEST OF M&NE RR R/W, PART SEC 10, NORTH 225 RDS SEC 15 WEST OF M&NE RR R/W, NW/4 EAST OF M&NE RR R/W, W/2NE/4 SEC 15, NE/4NE/4 SEC 16-22N-16W.

LIBER 291 PAGE 194

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-7042-	04-10-68	HENRY F MC CLELLAN	284-930

E/2NW/4 SEC 11-24N-15W.

MH-7043-	04-13-68	SAMUEL H GAUTHIER	283-11

N/2NW/4SE/4 & PT N/2SW/4 EAST OF M&NE RR R/W SEC 15-22N-16W.

MH-7081-	04-10-68	KENNETH R HILLIARD	283-13

NE/4SE/4, S/2 OF W 5/8 OF NE/4, PT E/2NE/4 COMM AT E/4 POST W 990 FT, N 882 FT, E 990 FT, S 882 FT TO POB SEC 26-23N-15W.

MH-7082-	04-11-68	WILLIAM F BROWN	283-15

N/2NW/4SE/4 SEC 11-23N-14W.

MH-7107-	04-16-68	LAWRENCE J SADLER	283-17

SE/4NE/4 SEC 9-22N-15W.

MH-7108-	04-17-68	ANDREW SUIDA	283-19

W 80 ACS OF SW FRL/4, EXC COM SW/C, E ALG SEC LINE 832.2 FT TO REG. TH 132 FT, N 198 FT, W 132 FT, S 198 FT TO BEG SEC 20-22N-16W.

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-7145-	04-09-68	LARRY M BAHR	285-595

E/2NW/4SW/4 SEC 13 & SW/4NE/4 EXC STRIP 2 RDS 1 WIDTH N & S ALG W FROM FOR RD PURPOSE, ALSO EXC S/2SE/4SW/4NE/4 ALSO EXC COM 33 F & L OF SW/C, N 1320 FT, W 327 FT, S 1320 FT TO BEG SEC 24-22N-16W.

MH-7146-	04-09-68	HATTIE A ABELE	283-21

NE/4NW FRL/4, NW/4NE/4, SE/4NE/4 & STRIP 2 RDS WIDE RUNNING N & S ALONG W ONLY LINE OF SW/4NE/4 FOR ROAD PURPOSES. BEING PT OF SW/4NE/4 SEC 24-22N-18W.

MH-7147-	04-09-68	PERRY DEEL	283-23

NE/4SW/4 SEC 8-23N-14W.

MH-7148-	04-09-68	LILLIAN DARROW	283-25

NE/4NW/4 SEC 9-23N-14W.

MH-7149-	04-10-68	IDA J NEIMITALO	283-27

SE/4SE/4 SEC 13-23N-142.

MH-7150-	04-10-68	JOHN PAHKANEN	283-29

SW/4SW/4 SEC 9, NE/4NE/4 SEC 20-23N-14W. [17 OF 92]

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-11767-	07-24-68	BESS S NEWTON	286-783
NW/4SE/4 SEC 34-22N-15W.			
MH-11923-	06-11-68	ARTHUR J SCHWAIGER	287-326
NE/4NE/4 SEC 14-22N-16W.			

TOGETHER WITH THE RIGHTS INCIDENT THERETO AND THE PERSONAL PROPERTY THEREON, APPURTENANT THERETO, OR USED OR OBTAINED IN CONNECTION THEREWITH.

* * *

RECORDED THIS 16th DAY OF SEPTEMBER, 1967.

/s/_____
T. Orr
Rebecca A. Orr

* * *

PAGE 92 OF 92

OIL AND GAS LEASE

THIS AGREEMENT, entered into this the 10th day of April, 1960, between Earl E. Styles and Effie T. Styles, husband and wife of P.O. Box 51, Gaylord, Michigan hereinafter called lessor, and W. B. Philips of P.O.Box 3275, Saginaw, Michigan, hereinafter called lessee, does witness:

1. That lessor, for and in consideration of the sum of Ten Dollars ($10.00) in hand paid, and of the covenants and agreements hereinafter contained to be performed by the lessee, has this day granted and leased and hereby grants, leases and lets exclusively unto the lessee for the purpose of exploring and operating for and producing oil and gas, laying pipe lines, building ranks, storing oil, building powers, stations, telephone lines and other structures thereon to produce, save, take care of and manufacture all of such substance, and for housing and boarding, employees the following described tract of land in Otsego County, Michigan to-wit:

Township 29 North, Track 5 West
Section 2: All
[Section 11. . .]

and containing 940 acres, more or less.

* * *

5. If operations for the drilling of a well for oil or gas are not commenced on said land on or before one year from this date, this lease shall terminate as to both parties, unless the lessee shall, on or before one year from this date,

pay or tender to the lessor or for the lessor's credit in the Gaylord State Bank at Gaylord, Michigan or its successors, which bank and its successor's are the lessor's agent and shall continue as the depository of any and all sums payable under this lease, regardless of changes of ownership in said land or in the oil and gas, or in the rental to accrue thereunder, the sum of Nine Hundred Forty and 58/100 Dollars ($940.58) which shall operate as rental and cover the privilege of deferring the commencement of drilling operations for a period of one year. In like manner and upon like payments or tenders, the commencement of drilling operations may be further deferred for like periods successively. All payments or tenders may be made by check or draft of lessee or any assignee thereof, mailed or delivered on or before the rental paying date. Notwithstanding the death or the lessor, or his successor in interest, the payment or tender of rentals in the manner provided above shall be binding on the heirs, devisees, executors, and administrators of such person.

* * *

IN WITNESS WHEREOF, we sign the day and year first above written.

Witnesses:

/s/_____	/s/_____
Dorothy Nowak	Earl E. Styles SS No. 379-28-2501
/s/_____	/s/_____
Gregg D. Styles	Effie T. Styles

STATE OF Michigan) ACKNOWLEDGMENT
) TO THE LEASE
COUNTY OF Otsago)

On this 11th day of APRIL, 1968, before me personally appeared Earl E. Styles and Effie T. Styles, husband and wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that the ??? executed the same as their free act and deed.

/s/_____
Dorothy M. Nowak
Notary Public

THIS INDENTURE, made the 10th day of April in the year of our Lord one thousand nine hundred and sixty-eight BETWEEN Earl E. Styles and Effie T. Styles,
husband and wife, of
Gaylord, Michigan 49735
Parties of the first part

and

Stanley S. Styles
Gaylord, Michigan 49735
Party of the second part,

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of ONE DOLLAR AND OTHER VALUABLE CONSIDERATIONS--------- to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged by these presents, grant, bargain, sell, remise, release and forever QUIT-CLAIM unto the said party of the second part and to his heirs and assigns, FOREVER, all those certain piece or parcels of land situated in the Township of Gaylord in Otsego County, and State of Michigan, known and described as follows:

All Oil, gas, and minerals now owned by the Grantor in the following descriptions:

Sections Thirty-three (33) and Thirty-four (34), T.30 N., R. 3 W.,

ALSO, Sections One(1), (2), Three (3), Ten (10), Eleven (11), and Twelve (12), T.29 N., R. 3W.,

ALSO, Sections Five (5), Six (6), Seven (7), and Eight (8), T.29 N., R. 2 W.,

ALSO, Section Thirty-one (31), T.30 N., R. 2 W.,

ALSO Section Twenty-one (21) T.29 N., R. 3 W. All being in Otsego County, Michigan.

LIBER 143 PAGE 451

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining: to Have and to Hold the said Earl E. Styles and Effie T. Styles to the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part his heirs and assigns, FOREVER.

In Witness Whereof, The said parties of the first part have hereunto act their hands and seals the day and year first above written.

Signed, Sealed and Delivered in Presence of:

/s/_____
Gregg D. Styles

/s/_____
Earl E. Styles

/s/_____
Dorothy M. Nowak

/s/_____
Effie T. Styles

* * *

ASSIGNMENT OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, W. B. PHILLIPS, and wife, GEORGIA ANN PHILLIPS, 10706 Archmont Drive, Houston, Texas 77040, hereinafter designated "ASSIGNOR", for and in consideration of One Dollar ($1.00) and other good and valuable considerations, receipt of which is hereby acknowledged, does hereby sell, assign, transfer, act over, and convey unto SHELL OIL COMPANY, a Delaware corporation, with offices at P.O. Box 1509, Midland, Texas 79701, hereinafter designated "ASSIGNEE", the following Oil and Gas Leases described in EXHIBIT A, attached hereto and made a part hereof, as such leases may have heretofore been amended, covering lands in Otsego County, Michigan, together with all rights incident thereto and all personal property thereon, appurtenant thereto, or used in connection therewith.

IN WITNESS WHEREOF, this instrument is duly executed this 22nd day of December, 1971.

Witnesses:

/s/_____	/s/_____
ALLEN L. DAVIS, JR.	W. B. PHILLIPS
/s/_____	/s/_____
SANDRA G. ANDREWS	GEORGIA ANN PHILLIPS

* * *

LIBER 152 PAGE 133

EXHIBIT A

IN ASSIGNMENT OF OIL AND GAS LEASES IN OTSEGO COUNTY, MICHIGAN

DATED DECEMBER 22, 1971

EXECUTED BY W.B. PHILLIPS and wife, GEORGIA ANN PHILLIPS

IN FAVOR OF SHELL OIL COMPANY

SHELL FILE NO.	DATE	LESSOR/S/	VOL. PAGE
MH-06032-	03-25-68	JOSEPH D. BOURKE	124-624

NE/4 WEST OF BR. 5/25W/4 EXC THAT PORTION OF STATE HWY 75, NF/4SF/4 WE ST OF BR. 4W/4SE/4, S/2SE/4 EXC 15 SO RODS IN NF/C SE/4SE/4 SEC 16 & W/RNF/4 SEC 25- 31N-3D.

MH-06J33	03-21-68	GERALD R BRANDENBURG	124-625

E/R SEC 34-31N-4W.

MH-26034-	03-26-68	STANLEY V. SANDERS	124-626

4/25E/4 SEC 4-30V-4W.

SHELL FILE NO.	DATE	LESSOR/S/	VOL. PAGE
MH-26015	03-26-68	JOSEPH SLVIMSKI	124-630

2/25C/4, S/25W/4 SEC 15-31N-3W.

MH-06035-	03-27-68	VINCENT F. O ROURKE	124-632

2/2SC/4, SW/4SF/4, S/25W/4, SE/4NW/4 SEC 20-32N-3W

MH-06078-	03-26-68	KARL N SCHROEDER	124-634

6/2 SEC 6, W/2 SEC 9-304-1W.

MH-06071-	03-27-68	DEY MOIMOT	124-636

PT N/25W/4 SEC 1M-20N-3W & THAT PT OF NE/4 E OF R/W & W OF CO ROAD 27, EX N 14 RODS & S 18 FT. SEC 16-31N-32.

LIBER 152 PAGE 151

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-07252-	04-19-68	ISADOR F KOSYLCZAK	125-235

E/25W/4 EXC S 1/4 POST OF SEC 22, TH ALONG LINE TO S SEC LINE 16 RODS, TH N TO N E S 1/4 LINE 15 RODS TH F ALONG LINE TO N E S LINE 15 RODS TO POB, SEC 22. W/2E/2 SEC 27-30N-1W.

MH-07253-	04-19-68	WILLIAM MC CAMERON	125-237

S/2NW/4, W/2SW/4 SEC 22-30N-1W.

MH-07255-	04-19-68	POND W HANSEY	125-238

SW/4 SEC 23-304-1W.

MH-07314-	04-16-68	HARRY E MEADOR	124-669

SC/4SE/4 SEC 23-31N-4W.

MH-07442-1	04-10-68	CARL F STYLES	126-741

ALL SEC 2, F/2F/2, SW/4SE/4, S/25W/4, NE/4SW/4 SEC 11-28N-3W.

MH-07442-2	06-22-68	HOWARD FORD	125-243

ALL SEC 2, E/2E/2, SW/4SF/4, S/2SW/4, NW/4SW/4 SEC 11-208-1W.

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-07442-3	06-28-68	MOLLIE A NICHELSON	124-245

ALL SEC 2, E/2E/2, SW/4SF/4, S/25W/4, NW/4SW/4 SEC 11-298-38.

MH-07443-1	04-10-68	CARL E	125-247

PTS OF SECS 1 & 12-294-3W, PT OF SEC 6-294-2W, PT SEC 31-304-2W TOGETHER W/ALL RELICTIONS & ACRATIONS THERETO & TOGETHER ALSO W/THAT PORTION OF THE BED OF OPAL, BELL MARIE & TOWN LINE LAKES RIPARIAN TO LANDS.

LIBER 152 PAGE 197

SHELL FILE NO.	DATE	LESSOR/S/	LIBER PAGE
MH-09284-	05-27-68	JOHN PEWINSKI ET AL	133-558
MH-11569-	05-09-68	WALTER CAMPBELL	128-113

W/2SE/4 SEC 1-30N-1W IN OTSEGO CO, SW/4NE/4, FRL 3/2NW/4, FRL E/2NE/4SW/4 SEC 18-30N-1E IN MONTMORENCY CO.

PAGE 65 OF 65

LIBER 165 PAGE 265

MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS:

That STYLES REAL ESTATE, INC., of Gaylord, Michigan, hereinafter called "Grantor", for a valuable consideration paid to it by STANGOR LAND COMPANY, a Michigan Co-partnership, of P.O. Box 531, Gaylord, Michigan 49735, hereinafter called "Grantee", does hereby convey and quit-claim unto Grantee an undivided one-fourth (1/4) interest in all oil, gas and other minerals in and under and that may be produced from those certain lands situate in Otsego County, Michigan, more specifically described in Exhibit "A", hereto attached, which Exhibit by this specific reference is hereby incorporated herein.

This sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed.

It is the intent hereof to quit-claim to Grantee an undivided one-half (1/2) of Grantor's mineral interest of record in all of the Sections of land enumerated in said Exhibit "A", whether or not all of the properties are correctly described therein.

IN WITNESS WHEREOF, Grantor has executed this conveyance this 15th day of January, 1973.

Witness:

STYLES REAL ESTATE,INC

/s/_____
Dorothy M. Nowak

By/s/_____
Stanley S. Styles
Its President

/s/_____
Elizabeth J. Hitchock

LIBER 165 PAGE 266

EXHIBIT "A"

in Township 29 North, Range 3 West,
being Otsego Lake Township:

Section One (1):

Lots One (1), Two (2), Three (3) and Four (4); the West Half (W ½) of the Northeast Quarter (NE 1/4); the East Half (E ½) of the Northwest Quarter (NW 1/4); the Northwest Quarter (NW 1/4) of the Northwest Quarter (NW 1/4); and the Southwest Quarter (SW 1/4).

Section Two (2):

Entire Section.

Section Three (3):

The Northeast Quarter (NE 1/4) and the Northeast Quarter (NE 1/4) of the Southeast Quarter (SE 1/4).

Section Ten (10):

The Southeast Quarter (SE 1/4); and the West Half (W ½) of the Northeast Quarter (NE 1/4).

Section Eleven (11):

The East Half (E1/2) of the East Half (E ½); the Southwest Quarter (SW 1/4) of the Southeast Quarter (SE 1/4); the South Half (S ½) of the Southwest Quarter (SW 1/4); and the Northwest Quarter (NW 1/4) of the Southwest Quarter (SW 1/4).

Section Twelve (12):

Lots One (1), Two (2) and Five (5); the West Half (W ½) of the Northwest Quarter (NW 1/4); and the Southwest Quarter (SW 1/4).

In Township 29 North, Range 2 West,
being the South part of Chenter Township:

Section Six (6):

Lots Two (2) and Three (3), and the Southwest Quarter (SW 1/4) of the Northeast Quarter (NE 1/4).

In Township 30 North, Range 2 West,
being the North part of Chenter Township:

Section Thirty-one (31):

The West Half (W ½) of the Southeast Quarter (SE 1/4).

In Township 30 North, Range 3 West,
being Bagley Township:

Section Thirty-three (33):

The Northeast Quarter (NE 1/4)

Section Thirty-four (34):

Entire Section.

CERTIFICATE OF ASSUMED NAME

THE UNDERSIGNED hereby certifies, under the provisions of Michigan Statutes Annotated 19.821, et. seq., that the following person (or persons) now owns (or) intends to own, conduct or transact business in the County of Otsego, State of Michigan, under the name, designation or style set forth below:

1. NAME OF BUSINESS: STANGOR LAND COMPANY

2. ADDRESS OF BUSINESS: 240 W. Main Street, Gaylord, MI 49735

3. NAME OF PERSON OR PERSONS, owning, conducting, transacting or composing the above business, and the home address of each:

NAME OF PERSON RESIDENCE ADDRESS

(Print) Gregory D. Styles, 1611 Big Lake Road, Gaylord, MI 49735

4. If an entity, other than an individual, is included complete the reverse side of this form.

5. NON-RESIDENTS OF MICHIGAN by filing this certificate under M.S.A. 19.821 consent that suits and actions may be commenced against them in the courts of Michigan by service of any process or pleading authorized by the laws of Michigan on the Otsego County Clerk. (Consent to Suit Form - BA-005 --

Additional Fee of $2.00)

6. SIGNATURES OF ALL PERSONS LISTED ABOVE - Acknowledged before a Notary Public.

(Signature) /s/_____
Gregory D. Styles

STATE OF MICHIGAN)
COUNTY OF OTSEGO) SS.

Subscribed and sworn to before me this 3rd day of March, 1983, by all persons listed above.

/s/_____
Dorothy M. Nowak
Notary Public, Otsego County, Michigan

Exhibits - Complaint With Jury Demand - No. 93-10714-CK

DISSOLVED

TYPE OR PRINT - USE BLACK INK

MCL-445.2b (MSA 19.824) Assumed Name
MCL-449.104B (MSA 20.116) Copartnership

Filing Fee $10.00

Notice of Dissolution of Copartnership or Business under Assumed Name

Notice is hereby given that the copartnership or business heretofore conducted under the assumed name of

STANGOR LAND COMPANY

Located at 240 W. Main Street, Gaylord, Michigan 49735 has been dissolved and is no longer engaged in business.

Dated March 3, 1983

NOTE: All members of an Assumed Name are required to sign.

/s/_____
STANLEY S. STYLES, Individually and as Trustee

/s/_____
GREGORY D. STYLES, Individually and as Trustee

LIBER 322 PAGE 590

ASSIGNMENT AND CONVEYANCE

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, STANLEY S. STYLES, individually and as Trustee under a certain Trust Agreement dated May 5, 1979, hereby sells, assigns, transfers, quit claims and sets over unto GREGORY D. STYLES, Trustee under a certain Trust Agreement dated May 11, 1979, all his right, title and interest in and to all assets, of whatever nature and wheresoever situate, owned and/or possessed by STANGOR LAND COMPANY, a Michigan Co-partnership, of 240 W. Main, Gaylord, Michigan, including but not limited to all of the following described premises, situated as hereinafter described, to-wit:

1. STATE OF WISCONSIN, County of Florence - All real estate owned in the name of Stangor Land Company, a Michigan Co-partnership.

2. STATE OF MICHIGAN, Counties of Chippewa, Dickinson, Mackinac, Otsego, Cheboygan and Menominee - All real estate owned in the name of Stangor Land Company, a Michigan Co-partnership.

Stanley S. Styles acknowledges by this Assignment and Conveyance that all of the above properties or interest therein owned by the Stangor Land Company may from this date forward be transferred to any third party, upon the

execution of proper documents of conveyance/transfer in regard thereto by Gregory D. Styles, and shall vest absolute title in Gregory D. Styles, Trustee, in reference to the partnership interest of Stangor Land Company.

In the Presence of:

/s/_____
STANLEY S. STYLES

/s/_____
Dorothy M. Nowak

/s/_____
William J. Snyder

STATE OF MICHIGAN) Recorded 3rd day of March
COUNTY OF OTSEGO) 1983 at 3:04

/s/_____
REGISTER OF DEEDS

ASSIGNMENT AND CONVEYANCE

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, STANLEY S. STYLES, individually and as Trustee under a certain Trust Agreement dated May 5, 1979, hereby sells, assigns, transfers, quit claims and sets over unto GREGORY D. STYLES, Trustee under a certain Trust Agreement dated May 11, 1979, all his right, title and interest in and to all assets, of whatever nature and wheresoever situate, owned and/or possessed by STANGOR LAND COMPANY, a Michigan Co-partnership, of 240 W. Main, Gaylord, Michigan, including but not limited to all of the following described premises, situated as hereinafter described, to-wit:

1. STATE OF WISCONSIN, County of Florence - All real estate owned in the name of Stangor Land Company, a Michigan Co-partnership.

2. STATE OF MICHIGAN, Counties of Chippewa, Dickinson, Mackinac, Otsego, Cheboygan and Menominee - All real estate owned in the name of Stangor Land Company, a Michigan Co-partnership.

Stanley S. Styles acknowledges by this Assignment and Conveyance that all of the above properties or interest therein owned by Stangor Land Company may from this date forward be transferred to any third party, upon the execution of proper documents of conveyance/transfer in regard thereto by Gregory D. Styles, and shall vest absolute title in Gregory

D. Styles, Trustee, in reference to the partnership interest of Stangor Land Company.

In the Presence of: /s/_____
STANLEY S. STYLES

/s/_____
Dorothy M. Nowak

/s/_____
William J. Snyder

STATE OF MICHIGAN)
COUNTY OF OTSEGO) SS.

The foregoing instrument was acknowledged before me this 3rd day of March, 1983, by STANLEY S. STYLES.

/s/_____
Dorothy M. Nowak
Notary Public

GORDON E. GABLE
Attorney and Counselor

May 16, 1983

Mr. Gregory D. Styles
Stangor Land Company
P.O. Box 429
Gaylord, Michigan 49735

Dear Gregg:

Enclosed herewith you will find a copy of a letter which I have forwarded on even date to Mr. DellaGrana, which I believe with the enclosures should solve any problems you should have on the Wisconsin property.

In addition, I am enclosing four copies of the Amended Assignment and Conveyance which I would like to have Stan sign in the same manner and notarized two days later than the original document. The only change, as you will note, is in reference to the date of your Trust Agreement. You may wish to re-record this Amendment in the appropriate counties. With this Amendment, you should only be required to sign each conveyance individually and as Trustee u/a Trust Agreement dated March 26, 1981, with the signature of Glenda as required by the Assumed Name Certificate as filed. If this is not satisfactory, then I will forward you Amended Assumed Name Certificates.

Yours very truly,

GORDON E. GABLE

AMENDED ASSIGNMENT AND CONVEYANCE

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, STANLEY S. STYLES, individually and as Trustee under a certain Trust Agreement dated May 5, 1979, hereby sells, assigns, transfers, quit claims and sets over unto GREGORY D. STYLES, Trustee under a certain Trust Agreement dated March 26, 1981, all his right, title and interest in and to all assets, of whatever nature and wheresoever situate, owned and/or possessed by STANGOR LAND COMPANY, a Michigan Co-partnership, of 240 W. Main, Gaylord, Michigan, including but not limited to all of the following described premises, situated as hereinafter described, to-wit:

1. STATE OF WISCONSIN, County of Florence - All real estate owned in the name of Stangor Land Company, a Michigan Co-partnership.

2. STATE OF MICHIGAN, Counties of Chippewa, Dickinson, Mackinac, Otsego, Cheboygan and Menominee - All real estate owned in the name of Stangor Land Company, a Michigan Co-partnership.

Stanley S. Styles acknowledges by this Amended Assignment and Conveyance that all of the above properties or interest therein owned by Stangor Land Company may from this date forward be transferred to any third party, upon the execution of proper documents of conveyance/transfer in regard thereto by Gregory D. Styles, and shall vest absolute

title in Gregory D. Styles, Trustee, in reference to the partnership interest of Stangor Land Company.

This Amendment is made to correct the scrivener's mistake in the date of the Gregory D. Styles Trust Agreement.

In the Presence of: /s/_____
STANLEY S. STYLES

/s/_____
Dorothy M. Nowak

/s/_____
William J. Snyder

STATE OF MICHIGAN)
COUNTY OF OTSEGO) SS.

The foregoing instrument was acknowledged before me this 5th day of March, 1983, by STANLEY S. STYLES.

/s/_____
Dorothy M. Nowak
Notary Public

LIBER 283 PAGE 18 MH-7081
OIL AND GAS LEASE

THIS AGREEMENT, entered into this the 10th day of April, 1968, between Kenneth R. Hilliard and Jo Hannah Hilliard, his wife, of Route 1 Kaleva, Michigan hereinafter called lesser, and J.L. Orr of P.O. Box 3272 Saginaw, Michigan hereinafter called lessee, does witness:

1. That lessor, for and in consideration of the sum of Ten Dollars ($10.00) in hand paid, and of the covenants and agreements hereinafter contained to be performed by the lessee, has this day granted and leased and hereby grants, leases and lets exclusively unto the lessee for the purpose of exploring and operating for and producing oil and gas, laying pipe lines, building ranks, storing oil, building powers, stations, telephone lines and other structures thereon to produce, save, take care of and manufacture all of such substance, and for housing and boarding, employees the following described tract of land in Manistee County, Michigan to-wit:

Township 23 North, Range 15 West
Section 26: NE1/2 of SE ½, S1/2 of W 5/8 of NE1/2, Part of E1/2 of NE1/2 Com at E Post W 990 Ft, N 882 Ft, E 990 Ft, S 882 Ft to Pt of Beg.

and containing 110 acres, more or less.

* * *

5. If operations for the drilling of a well for oil or gas are not commenced on said land on or before one year

from this date, this lease shall terminate as to both parties, unless the lessee shall, on or before one year from this date, pay or tender to the lessor or for the lessor's credit in the Security National Bank of Manistee Bank at Manistee, Michigan or its successors, which bank and its successor's are the lessor's agent and shall continue as the depository of any and all sums payable under this lease, regardless of changes of ownership in said land or in the oil and gas, or in the rental to accrue thereunder, the sum of One Hundred Ten and no/100 Dollars ($110.00) which shall operate as rental and cover the privilege of deferring the commencement of drilling operations for a period of one year. In like manner and upon like payments or tenders, the commencement of drilling operations may be further deferred for like periods successively. All payments or tenders may be made by check or draft of lessee or any assignee thereof, mailed or delivered on or before the rental paying date. Notwithstanding the death or the lessor, or his successor in interest, the payment or tender of rentals in the manner provided above shall be binding on the heirs, devisees, executors, and administrators of such person.

* * *

IN WITNESS WHEREOF, we sign the day and year first above written.

Witnesses:

/s/_____
Raynard Hiipaka

/s/_____
Kenneth R. Hilliard
No. 373-01-8082

/s/_____ /s/_____

Gladys Hiipaka Jo Hannah Hilliard

* * *

ROSI, GREEN & LEVINE, P.C.
Attorneys and Counselors at Law

June 15, 1989

Shell Western E&P Inc.
P.O. Box 4457
Houston, TX 77210

Re: Jerome A. Ray & Karen M. Ray
Property #s 132190001
132442001
132190001
132190020
132442001
132442020
Owner # RAY4OCOO

Gentlemen:

On behalf of Jerome A. & Karen M. Ray, owners of the foregoing and entitled to royalties from the subject properties, we request an explanation of the computation of the "TAX" shown in the column circled on the attached photocopy of the Ray's most recent Royalty Check Stub; specifically, what taxes are deducted and what tax rates are used?

Thank you for your assistance in this matter.

Very truly yours,

ROSI, GREEN & LEVINE, P.C.
/s/_____
Philip R. Rosi

Shell Oil Company
E&P Finance
P.O. Box 4655
Houston, TX 77210-4655

July 6, 1989

Philip R. Rosi
Rosi, Green & Levine, P.C.
P.O. Box 1826
Traverse City, MI 49685

Dear Mr. Rosi,

MICHIGAN SEVERANCE TAX RATES
OWNER NUMBER: RAY4OCOO

PROPERTY ID'S:	1-32190-001-1	1-32190-020-2
	1-32190-001-2	1-32442-001-1
	1-32442-001-2	1-32442-020-2

On behalf of Shell Western E&P Inc., and in response to your inquiry regarding Michigan severance tax withheld, the tax rates vary depending on the type of product produced by the property. The following schedule details the rates and classifications for the above properties.

Property Number	Product	Tax Rate
1-32190-001-1	Oil/Oil Condensate	.076
1-32442-001-1	Oil/Oil Condensate	.076
1-32190-001-2	Residue Gas	.06
1-32190-020-2	Plant Products	.06
1-32442-001-2	Residue Gas	.06
1-32442-020-2	Plant Products	.06

Please note that the taxes for Residue Gas are not based on the gross values found on the check detail. Residue Gas tax is computed using gross value less cost deducts. The values appearing on the check detail include additional adjustments for tax reimbursement. The taxes for the Oil and Plant Products are determined by multiplying the values on the check detail by the appropriate tax rates.

If you have any further questions concerning the Residue Gas, please contact Tanya Breaux at (713) 241-9102. If you have any questions concerning the other products, please contact Jeanne Harteker at (713) 241-9099.

Yours very truly,

/s/_____
J.A. Ludwig, Supervisor
Product Accounting - Central Michigan/Oklahoma
Business Processing
On Behalf of Shell Western E&P

ROSI, OLSON & LEVINE, P.C.
Attorneys and Counselors at Law

July 12, 1989

Shell Oil Company
E&P Finance
P.O. Box 4655
Houston, TX 77210-4655

ATTN: J. A. Ludwig, Supervisor
Product Accounting

Re: Michigan Severance Tax Rates
Jerome A. Ray & Karen M. Ray
Owner #: RAY4OCOO
Property #'s: 1-32190-001-1 1-32190-020-2
1-32190-001-2 1-32442-001-1
1-32442-001-2 1-32442-020-2

Our File No. 62.02

Dear Mr. Ludwig:

Thank you for your letter of July 6, 1989, providing an explanation that the tax withheld is the Michigan Severance Tax. We are somewhat confused, however, as the Michigan Severance Tax Statute, MCLA 205.303 calls for tax rates of 5% on the gross cash market value of gas and 6.6% on the gross cash market value of oil. The tax rates you have indicated of .06 and .76 respectively, appear to be 1% higher than the statutory rate. We would appreciate an explanation. Thank you in advance for your assistance in this matter.

Very truly yours,

ROSI, OLSON & LEVINE, P.C.

/s/_____
Philip R. Rosi

Shell Oil Company
Business Processing
P.O. Box 4655
Houston, TX 77210-4655

July 27, 1989

Philip R. Rosi
Rosi, Green & Levine, P.C.
P.O. Box 1826
Traverse City, MI 49685

Dear Mr. Rosi,

MICHIGAN SEVERANCE TAX RATES
OWNER NUMBER: RAY4OCOO

PROPERTY ID'S:	1-32190-001-1	1-32190-020-2
	1-32190-001-2	1-32442-001-1
	1-32442-001-2	1-32442-020-2

On behalf of Shell Western E&P Inc., we are writing in response to your inquiry regarding the Michigan tax rates of .06 for gas and .076 for oil. The tax rates consist of the base severance tax rates of .05 and .066, respectively and an Oil and Gas Fee of .01 imposed by the State of Michigan.

If you have any further questions, please contact Jeanne Harteker at (713) 241-9099.

Yours very truly,

/s/_____
For: J.A. Ludwig, Supervisor
Product Accounting - Central Michigan/Oklahoma

ROSI, OLSON & LEVINE, P.C.
Attorneys and Counselors at Law

February 8, 1990

SHELL WESTERN E&P, INC.
P.O. BOX 4457
HOUSTON, TX 77210

Re: Our File No. 62.02

Gentlemen:

We represent several owners of minerals in the State of Michigan who have been receiving royalty payments from Shell Oil Company. Those persons are as follows:

Ray & Jean Cooley	Star Route, Box 527 Johannesburg, MI 49751
Patrice Freel	3 Nashua St Marblehead, MA 01945
Francis & Mary Latuszek	HC72, Box 173 Johannesburg, MI 49751 517/732-4330
James & Roberta Lawnichak	15685 Sparr Rd. Gaylord, MI

Old Kent Bank & Trust Trustee under Agreement dated July 18, 1982 with Jerome Marcenkowski	Old Kent Bank & Trust Attn: Thomas Webb 123 W. Main Street Gaylord, MI 49735
Old Kent Bank & Trust, Trustee Under Agreement dated July 8, 1982 with Irene Marcenkowski	Old Kent Bank & Trust Attn: Thomas Webb 123 W. Main Street Gaylord, MI 49735
Dyann Otero	P.O. Box 429 Gaylord, MI 49735
Stangor Land Company	P.O. Box 429 Gaylord, MI 49735
Douglas Styles	P.O. Box 429 Gaylord, MI 49735
Jerome & Karen Ray	7465 Torrant Manistee, MI 49660
Mose & Melvena Weber	HC 72, Box 525 Johannesburg, MI 49751

In analyzing the royalties paid to the foregoing over the years, it appears that check stubs regularly include a substraction for taxes. Directing your attention to correspondence of June 15, 1989, through July 27, 1989, between this office and J.A. Ludwig at Business Processing for Shell Oil Company, it appears that in addition to the severance tax levied upon producers pursuant to MCLA 205.301, Shell has also been subtracting a portion of the

"privilege fee" imposed upon producers under MCLA 319.22.

We direct your attention to the 1963 opinion of the Michigan attorney general, Opinion No. 4160, (copy enclosed), which opinion discussed the privilege fee and found it to be imposed upon the severor or producer and not upon the lessor. The attorney general noted that "there is authority to the effect that by statute or by agreement the shifting of this tax can be made to the lessor." As we understand the facts surrounding Shell's contractual relationship with the aforementioned persons, the oil and gas leases with them do not on their faces authorize Shell to deduct any portion of the privilege fee from the royalty payments due them, facts directly parallel to those which set the stage for the A.G. opinion.

From our examination of information available to us, Shell has regularly reported to its lessors that the only state tax which it subtracted from the royalties was the Severance Tax. To the best of our information it has never disclosed to the foregoing royalty owners that it subtracts the privilege fee in addition to the severance tax. The erroneous information provided to the royalty owners via the U.S. Mail over the past several years is part of a repeated practice or pattern without excuse or justification which has resulted in both depriving the royalty owners of their proper income and in unjustly enriching Shell.

In light of the foregoing, on behalf of the above named royalty owners, we demand that Shell promptly institute procedures to effect the reimbursement of all privilege fees subtracted from the royalties of the above persons together

with legal interest from the date Shell first commenced its practice of subtracting privilege fees from those persons. If we do not receive assurance within the next thirty (30) days of Shell's willingness to correct its past practices with regard to these royalty owners, we have been instructed to initiate appropriate civil proceedings to achieve the maximum recovery with the broadest scope of remedy that is legitimately available.

Your immediate attention to this matter is expected.

Very truly yours,

ROSI, OLSON & LEVINE, P.C.

/s/_____
Philip R. Rosi

ROSI, OLSON & LEVINE, P.C.
Attorneys and Counselors at Law

April 10, 1990

SHELL WESTERN E&P, INC.
P.O. BOX 4457
HOUSTON, TX 77210
Re: Our File No. 62.02

Gentlemen:

It has been almost two months since your legal counsel, Mr. Pfister, telephoned the undersigned to advise that a formal response was being prepared to our demand letter to Shell dated February 8, 1990, a copy of which is enclosed for your reflection. The issue set forth in that demand letter was simple and, assuming that Shell considers it is justified in its current practices, should not require an extensive time for reply.

By Shell's silence, we are forced to presume that Shell leaves our clients with no alternative but to initiate proceedings as set forth in prior correspondence.

Your immediate reply is anticipated.

Very truly yours,

ROSI, OLSON & LEVINE, P.C.

/s/_____
Philip R. Rosi

Shell Oil Company
P.O. Box 576
Houston, Texas 77001

May 2, 1990

Mr. Phillip R. Rosi
Rosi, Olson & Levine
P.O. Box 1826
Traverse City, MI 49685-1826

Dear Mr. Rosi:

SEE SUBJECT ATTACHMENT
YOUR FILE NUMBER 62.02
RE: SERVICE AGREEMENT BETWEEN SHELL OIL COMPANY AND SHELL WESTERN E&P INC.

This is in response to your letter of February 8, 1990, concerning the privilege fee imposed pursuant to MCLA 319.22.

Your letter suggests that Shell Western E&P Inc. has been improperly attributing a portion of the privilege fee to the royalty owners' share of production. In view of the fact that the privilege fee is imposed upon production, it is lawful that the royalty owners' share of production bear its proportionate part of the privilege fee. Furthermore, as the statute provides that the privilege fee be collected in the same manner as the severance tax, we see no reason to believe that the courts would accord the privilege fee a different treatment from the severance tax in this regard. Finally, the manner in which Shell Western E&P Inc. has been handling the privilege fee is

fully in accord with the custom and practice in the industry these many years.

We trust that this answers your question to your satisfaction. Thank you for your attention.

Sincerely,

/s/_____
A. Post
Manger Producing Properties
Property Administration

SUBJECT ATTACHMENT

Shell Western E&P Inc. - State Styles 3-11
Otsego County, Michigan
Otsego Lake 2 Field
Key Code: 1-14007

Shell Western E&P Inc. - Black - Cooley 2-11A
Otsego County, Michigan
Charlton 12 Field
Key Code: 1-13221

Shell Western E&P Inc. - Bearlake 17 Recovery Unit
Manistee County, Michigan
Bearlake 17 Field
Key Code: 1-13852

Shell Western E&P Inc. - Black - Cooley 1-12
Otsego County, Michigan
Charlton 12 Field
Key Code: 1-31970

Shell Western E&P Inc. - Rachow - Latuszek 2-31, 3-31A
Otsego County, Michigan
Charlton 31A Field
Key Code: 1-32002

Shell Western E&P Inc. - Lawnichak - Mysk 1-31
Otsego County, Michigan
Dover 33 Field
Key Code: 1-32073

Shell Western E&P Inc. - Briske 1-28

Manistee County, Michigan
Bearlake 33 Field
Key Code: 1-32190

Shell Western E&P Inc. - Weber - Briley 1-13
Otsego County, Michigan
Charlton 13 Field
Key Code: 1-32191

Shell Western E&P Inc. - Lawnichak - Mysk 3-33
Otsego County, Michigan
Dover 33 Field
Key Code: 1-32287

Shell Western E&P Inc. - Briske 2-28
Manistee County, Michigan
Bearlake 33 Field
Key Code: 1-32442

Shell Western E&P Inc. - Styles 1-2A
Otsego County, Michigan
Bagley 35 Field
Key Code: 1-32490

Shell Western E&P Inc. - State Maple Forest
Diefenback 1-3A
Crawford County, Michigan
Maple Forest 3 Field
Key Code: 1-32617

Shell Western E&P Inc. - Hejl 1-17
Manistee County, Michigan
Bearlake 17 Field

Exhibits - Complaint With Jury Demand - No. 93-10714-CK

Key Code: 1-32824

Shell Western E&P Inc. - Mid-Charlton 9 Waterflood Unit
Otsego County, Michigan
Charlton 9M Field
Key Code: 1-32944

Shell Western E&P Inc. - Styles State Otsego Lake 2-11
Otsego County, Michigan
Otsego Lake 11 Field
Key Code: 1-33513

Shell Western E&P Inc. - Chester 18 Waterflood Unit
Otsego County, Michigan
Charlton 13 Field
Key Code: 1-33727

Whitney Oil Company - Clous Unit 2-35
Grand Traverse County, Michigan
Grant 35 Field
Key Code: 1-33750

Shell Western E&P Inc. - Prosch 6-29A
Grand Traverse County, Michigan
Mayfield 29 Field
Key Code: 1-33872

Whitney Oil Company - Clous 2-35
Grand Traverse County, Michigan
Grant 35 Field
Key Code: 1-85647

CHECK STUBS

SHELL WESTERN E&P INC.
OIL & GAS PAYMENTS
P.O. BOX 4487
HOUSTON, TX 77210

SEE OIL AND GAS PAYMENT DETAIL STATEMENT - ENCLOSED

CHECK NUMBER	IRS/SSN	CHECK DATE	OWNER NUMBER
061382	38-2437984	10-26-92	S-AH9700

OWNER'S TOTAL: 1540.36

Stangor Land Co.
new stub

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUIT-CLAIM DEED. Number 803 Public Act

THIS INDENTURE, made March 8, A. D. 19 71

BETWEEN Stanley S. Styles and Helen Styles, his wife,

parties of the first part,

whose address is Gaylord, Michigan 49735

Styles Real Estate, Inc., a Michigan Corporation,

party of the second part,

whose address is 240 S. Main St., P.O. Box 531, Gaylord, Michigan 49735

Witnesseth, That the said party of the first part, for and in consideration of Actual consideration less than One hundred dollars (Exempt under Section 5 (a) of MSA 7.456 (5)).

to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, does by these presents grant, bargain, sell, remise, release and forever QUIT-CLAIM unto the said party of the second part, and to his heirs and assigns, Forever, all that certain piece or parcel of land situated in the Township of Otsego in Otsego County, and State of Michigan, and described as follows:

All Oil, Gas, and minerals now owned by the Grantor in the following descriptions:
Sections Thirty-three (33) and Thirty-four (34), T. 30 N., R. 3 W.,
ALSO, Sections One (1), Two (2), Three (3), Ten (10), Eleven (11), and Twelve (12), T. 29 N., R. 3 W.,
ALSO, Sections Five (5), Six (6), Seven (7), and Eight (8), T. 29 N., R. 2 W.,
ALSO, Section Thirty-one (31), T. 30 N., R. 2 W.,
ALSO, Section Twenty-one (21), T. 29 N., R. 3 W. All being in Otsego County Michigan.

STATE OF MICHIGAN } ss.
COUNTY OF OTSEGO }

Received March 8, A.D. 19 71 at 3:00 o'clock P. M.

Theodore A. Wise
REGISTER OF DEEDS

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining. To Have and to Hold the said premises to the said party of the second part, and to his heirs and assigns, to the sole and sole proper use, benefit and behoof of the said party of the second part, his heirs and assigns, Forever.

When applicable, pronouns and relative words shall be read as plural, feminine or neuter, respectively.

In Witness Whereof, The said party of the first part has hereunto set his hand the day and year first above written.

Signed, Sealed and Delivered in Presence of

Dorothy M. Nowak

Elizabeth J. Hitchcock

Stanley S. Styles

Helen Styles

STATE OF MICHIGAN, } ss.
COUNTY OF. Otsego

On March 8, 1971, before me, a Notary Public, in and for said County, personally appeared Stanley S. Styles and Helen Styles to me known to be the same person S described in and who executed the within instrument, who have acknowledged the same to be their free act and deed.

Dorothy M. Nowak
Dorothy M. Nowak

Drafted by:
Styles Real Estate, Inc.
P.O. Box 531
Gaylord

304a

OIL/GAS PAYMENT DETAIL STATEMENT

JEROME A. RAY & KAREN M. RAY
7465 TORRANT
MANISTEE, MI 49660

OWNER NO. RAY40C00
CHECK NO. 118965
CHECK DATE 5/25/89
IRS/SSN 377-38-3568

SHELL WESTERN E&P INC.
P. O. BOX 4457
HOUSTON, TX 77210

OWNER NO. RAY40C00
CHECK NO. 118965
CHECK DATE 5/25/89
IRS/SSN 377-38-3568

RETAIN FOR TAX PURPOSES
BANK-ID 8164

SEE REVERSE SIDE FOR CODE LEGENDS

MINUS SIGN (-) DENOTES DEDUCTION

PROPERTY	DATE MO/YR	P	TI	OSC CDE	WPT TAX CDE	PROPERTY TOTALS BBLS/MCF	VALUE	TAX	NET	UNIT PRICE	OWNER DECIMAL	OWNER TOTALS BBLS/MCF	VALUE	TAX	NET
132190001	04/89	1	RI			1713.39	33324.17.	2532.84-	30791.33	18.45	.0312500	53.54	1041.38	79.15-	962.24
132442001	04/89	1	RI			1755.15	34138.38	2594.38-	31542.02	18.45	.0312500	54.85	1088.79	81.07-	985.69
132190001	03/89	2	RI			13488.00	41554.25	3418.29-	38135.96	3.08	.0312500	421.44	1298.57	75.57-	1223.00
1 .2020	03/89	2	RI			.00	7439.98	445.80-	6994.18	.00	.0312500	.00	232.19	13.93-	218.26
1 .2001	03/89	2	RI			12901.00	39751.88	3313.38-	37438.30	3.08	.0312500	403.18	1242.24	72.29-	1169.95
132442020	03/89	2	RI			.00	4879.59	292.78-	4588.81	.00	.0312500	.00	152.49	9.15-	143.34

OWNER TOTAL 4702.48

WHEN WRITING REFER TO OWNER NO. RAY40C00 AND APPROPRIATE PROPERTY NUMBER.

SHELL OIL COMPANY
OIL & GAS PAYMENTS - WESTERN

P.O. BOX 4457
HOUSTON, TEXAS
77210

WHEN WRITING REFER TO OWNER AND PROPERTY NO.

PLEASE RETAIN FOR TAX PURPOSES

PROPERTY	*	FROM MO	FROM YR	THRU MO	THRU YR	VOLUME	TAX	NET VALUE	OWNER
133750001	1	12	82	12	82	601.78	1287.20	17367.98	27.
133750C30	2	11	82	11	82	.00	343.76	6142.38	12.80
133750001	7	12	82	12	82	WPT- TIER 3		1119.32-	1.74-

CHECK NUMBER	* 1-OIL 3-CONDENSATE 2 & 4-GAS & ASSOC. PROD. 7-WINDFALL PROFIT TAX	SS OR TAXPAYER NO	CHECK DATE	OWNER NUMBER	OWNER'S TOTAL
403449		58-6244869	01-21-83	STAH9900	38.20

307a

ML OIL COMPANY P.O. BOX 4457 HOUSTON, TEXAS 77210

AND GAS SUPPLEMENTAL CHECK STUB DATA PAGE 1 OF 1

STANGOR LAND COMPANY, A
MICHIGAN CO-PARTNERSHIP
P. O. BOX 531
GAYLORD, MICHIGAN 49735

BANK ID 4414
CHECK NO. 407429
DATE 01-21-83

OWNER NO. STAN9800

TAIN FOR TAX PURPOSES

WHEN WRITING REFER TO
OWNER AND PROPERTY NOS.

OPERTY	*	FROM MOYR	THRU MOYR	VOLUME	TAX	NET VALUE	OWNER VALUE
2490001	1	1282	1282	2294.49	4951.23	66805.66	1105.24
617001	1	1282	1282	1529.86	3291.99	44418.01	38.14
624001	1	1282	1282	9508.69	20689.52	279158.56	581.57
28-9501	1	1282	1282	4530.23	9775.68	131900.77	2182.18	
944001	1	1282	1282	3547.20	7650.62	103227.94	12903.49
513001	1	1282	1282	1848.91	3989.72	53832.29	445.30
367-001	1	1282	1282	1523.32	3277.99	44229.09	86.38
2490001	4	1182	1182	6606.00	1074.07	19762.48	326.95
2490020	4	1182	1182	.00	530.92	9486.37	156.94
617110	4	1182	1182	.00	41.75	745.97	.64
2624001	2	1182	1182	11289.00	1757.08	32456.21	67.62
4020	2	1182	1182	.00	545.67	9750.06	20.31
9001	4	1182	1182	7632.00	1256.91	22847.79	378.00
2629020	2	1182	1182	.00	793.60	14180.08	234.60
2944001	2	1182	1182	5340.00	665.44	12304.30	1536.04
2944020	2	1182	1182	.00	627.75	11216.60	1402.08
3513020	2	1182	1182	.00	259.65	4639.31	76.75
3513101	2	1182	1182	8049.60	1304.49	24096.17	199.32
3672001	2	1182	1182	1931.00	317.56	5853.89	11.43
3672020	2	1182	1182	.00	78.57	1403.86	2.74
2490001	7	1282	1282	WPT- 1111	1	21935.32-	362.90-
617001	7	1282	1282	WPT- 1111	3	2906.73-	2.50-
624001	7	1182	1182	WPT- 1111	1	.00	.00
2524001	7	1282	1282	WPT- 1111	1	91067.88-	190.97-
2-8501	7	1282	1282	WPT- 1111	3	8743.34-	144.65-
2944001	7	1282	1282	WPT- 1111	1	33675.76-	4234.47-
513001	7	1282	1282	WPT- 1111	3	3566.40-	29.52-
367-001	7	1282	1282	WPT- 1111	3	2894.31-	5.65-

PAGE TOTAL 16787.06

1-Gas 2-Cond 4-Other IRS/SS NO. OWNER NO. OWNER TOTAL
3-Oil 7-Partial Tax- 36-0244869 STAN9800 16787.06

STANCOR LAND CO.
P O BOX 429
GAYLORD, MI 49735

OWNER NO. STAN9700
CHECK NO. 061382
CHECK DATE 10/26/92
IRS/SSN 38-2437884

HOUSTON, TX 77210

1-713-241-PSRS

CHECK NO. 061382
CHECK DATE 10/26/92
IRS/SSN 38-2437884

SEE REVERSE SIDE FOR CODE LEGENDS

RETAIN FOR TAX PURPOSES
BANK-JD 8614

MINUS SIGN (-) DENOTES DEDUCTION

PROPERTY	DATE NO/YR	P	II	DSC CDE	WPT TAX CDE	PROPERTY TOTALS BBLS/MCF	PROPERTY TOTALS VALUE	PROPERTY TOTALS TAX	PROPERTY TOTALS NET	UNIT PRICE	OWNER DECIMAL	OWNER TOTALS BBLS/MCF	OWNER TOTALS VALUE	OWNER TOTALS TAX	OWNER TOTALS NET
113852001	09/92	1	RI			483.72	9829.59	728.37-	9101.22	20.32	.0020833	1.01	20.48	1.52-	18.96
132490001	09/92	1	RI			379.71	7717.59	571.87-	7145.72	20.32	.0185441	6.28	127.68	9.46-	118.22
132829001	09/92	1	RI			1343.88	25287.45	1871.58-	23385.87	20.32	.0185441	20.56	417.86	30.96-	386.90
133513001	08/92	1	RI			52.78	1072.75	79.48-	993.26	20.32	.0092720	.44	8.88	.66-	8.22
133873001	09/92	1	RI			1308.29	27600.21	2059.89-	25740.32	20.32	.0018531	3.67	74.39	4.92-	69.47
113852401	08/92	2	RI			.00	3543.65	265.88-	3337.77	.00	.0020833	.00	7.38	.43-	6.95
113852501	08/92	2	RI			8182.00	19374.02	1083.86-	18310.78	3.14	.0020833	12.84	40.37	2.22-	38.15
114867101	08/92	2	RI			5038.00-	931.77-	54.14	877.63-	.19	.0001822	.92-	.17-	.01	.18-
114867101	08/92	2	RI			45805.00	45235.80	2506.54-	42729.00	.99	.0001822	8.35	8.25	.46-	7.79
132490001	08/92	2	RI			594.00	1826.80	91.58-	1535.32	2.74	.0185441	9.83	30.87	1.52-	25.40
132490020	08/92	2	RI			.00	805.28	40.78-	758.50	.00	.0185441	.00	13.33	.73-	12.55
132617110	08/92	2	RI			.00	839.42	48.77-	790.65	.00	.0008586	.00	.72	.04-	.68
132829001	08/92	2	RI			12971.00	40867.68	2233.86-	38434.83	3.14	.0185441	214.58	672.91	35.94-	635.87
132829020	08/92	2	RI			.00	9501.14	552.02-	8949.12	.00	.0185441	.00	157.79	9.13-	148.66
133513020	08/92	2	RI			.00	726.63	42.32	684.41	.00	.0185440	.00	12.62	.70-	11.92
133513101	08/92	2	RI			1354.00	3865.28	212.34-	3653.05	3.08	.0092720	10.37	31.98	1.76-	30.22
133873001	07/92	2	RI			90.00	289.75	16.31-	273.44	3.22	.0018531	.18	.56	.03-	.53
133873001	08/92	2	RI			4759.00	15321.42	892.47-	14458.95	3.22	.0018531	9.29	29.92	1.66-	28.26
133873020	08/92	2	RI			.00	4746.02	275.74-	4470.28	.00	.0018531	.00	9.27	.54-	8.73
185847C30	08/92	2	MI			.00	887.31	51.28-	836.95	.00	.0041808	.00	3.07	.21-	3.46

WHEN WRITING REFER TO OWNER NO. STAN9700 AND APPROPRIATE PROPERTY NUMBER.

PAGE TOTAL	1843.48	103.04-	1540.38
GRAND TOTAL	1843.48	103.04-	1540.38

FOR DEPOSIT TO THE ACCOUNT OF

NAME K Hilliard

ACCOUNT NO. 000 2760406

DATE 11-22 19 82

Signature Required For Less Cash Deposits

MANISTEE
DIVISION ST. AUTO BANK
SOUTHGATE
SALEVA
BEAR LAKE
ARCADIA
PRESCOTT
MANISTEE, MICHIGAN 49660

Checks and other items are received for deposit subject to the provisions of the Uniform Commercial Code or any applicable collection agreement.

CURRENCY		
COIN		
CHECKS		
LIST SINGLY — BE SURE EACH ITEM IS ENDORSED		
Total From Other Side		
TOTAL		
Less Cash Received		
NET DEPOSIT	8002	80

Dollars | Cents

USE OTHER SIDE FOR ADDITIONAL LISTING

HIS NOTICE WITH YOU

E DATE | AMOUNT OF NOTE

EREST | PAYMENT AMOUNT

"DUPLICATE COPY"

309a

RETAIN THIS RECEIPT FOR YOUR RECORDS

BANK COPY

PROPERTY		VOLUME	TAX	NET VALUE	OWNER'S VALUE
113182001	110821082	18270.12	40340.43	544303.41	34018.96
113182301	209820982	13413.00	2122.55	39126.78	2445.42
113182401	209820982	.00	495.26	8849.88	553.12
113182001	710821082	WPT- TIER 1		183452.01-	11464.50-

COMPA
OIL & G
PAYMEN
WESTE

PO BOX
HOUSTON
7721

WHEN R
REFER TO
AND PRO

PLE.
RET.
FC
T/
PURP

Collection Dept.
-PAID
NOV 22 '82
SECURITY BANK
OF MANISTEE
MANISTEE, MICHIGAN

CE 4414 (REV 2-82)

CHEC		CHECK DATE	OWNER NUMBER	OWNER'S TOTAL
35!	-01-8082	11-19-82	HILP4000	25553.00

Hilliard
old stub
Exh. 10

Entered
11-27-82

SHELL WESTERN E&P INC.
1099 COORDINATOR - SOM
P. O. BOX 4457
HOUSTON, TX 77210-4457

KENNETH R. HILLIARD, JO HANNAH
HILLIARD & KEVIN A. HILLIARD
C/O SECURITY NATIONAL BANK
332 FIRST ST.
MANISTEE, MI 49660

310a

CHECK STUB DETAIL SUMMARY FOR 1991

PRODUCING PROPERTY OWNER NUMBER H[illegible]4000

DESCRIPTION	GROSS AMOUNT	SEVERANCE TAX	NET OWNER AMOUNT
OIL	30055.01	-2160.61	27894.40
GAS	69415.26	-3781.45	65633.81
OWNER TOTAL	99470.27	-5942.06	93528.21

SUBSTITUTE FORM 1099 - MISC

SHELL WESTERN E&P INC.
P. O. BOX 4457
HOUSTON, TX 77210

PAYER'S FEDERAL IDENTIFICATION NUMBER
76-0073231

RECIPIENT'S NAME AND ADDRESS . . . . .)

STANGOR LAND CO.
P O BOX 429
GAYLORD, MI 49735

RECIPIENT'S IDENTIFICATION NO.
38-2437984

RECIPIENT'S ACCOUNT NUMBER
STAH9700

1. RENTS $ .00	
2. ROYALTIES $ 27,414.82	
3. PRIZES AND AWARDS $ .00	
4. FEDERAL INCOME TAX WITHHELD $ .00	
5. FISHING BOAT PROCEEDS $ .00	
6. MEDICAL AND HEALTH CARE PAYMENTS $ .00	
8. SUBSTITUTE PAYMENTS IN LIEU OF DIVIDENDS OR INTEREST $ .00	7. NONEMPLOYEE COMPENSATION $ .00
9. PAYER MADE DIRECT SALES OF $5,000 OR MORE OF CONSUMER PRODUCTS TO A BUYER (RECIPIENT) FOR RESALE . . . . . ☐	
10. THE AMOUNT IN BOX 7 IS CROP INSURANCE PROCEEDS . . . . . ☐	

NOTICE TO RECIPIENT:

This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction will be imposed on you if this income is taxable and the IRS determines that it has not been reported.

FOLLOWING IS A SUMMARY OF CHECK STUB DETAIL USED TO PROVIDE THE ABOVE INFORMATION. AMOUNTS REPORTED BELOW SUMMARIZE ALL TYPES OF INTEREST OWNERSHIP. (PORTIONS OF THE AMOUNTS IN THE OWNERS GROSS VALUE COLUMN MAY BE REPORTABLE IN MORE THAN ONE BOX ABOVE, BUT THE TOTAL OF ALL REPORTED AMOUNTS SHOULD NOT EXCEED THE GROSS VALUE TOTAL BELOW).

PRODUCING PROPERTY OWNER NUMBER	STAH9700

DESCRIPTION	GROSS VALUE	SEVERANCE TAX	NET VALUE
OIL	15,763.17	1,197.12	14,566.05
GAS	11,652.48	664.09	10,988.39
CONDENSATE	.00	.00	.00
CO2	.00	.00	.00
SULPHUR	.00	.00	.00
WINDFALL PROFIT TAX			.00
FEDERAL WITHHOLDING			.00
INTEREST EXPENSE			.00
JOINT VENTURE EXPENSE			.00
MISCELLANEOUS TAX			.00
INTEREST INCOME			.00
TOTALS	27,415.65	1,861.21	25,554.44

FORM 1099-INT forwarded under separate cover for any amount in excess of $9.99. Applicable instructions included on the form.

GROSS AMOUNT REPORTED TO:	BOX 1 AMOUNT	BOX 2 AMOUNT	BOX 7 AMOUNT
	.00	.00	.00
	.00	.00	.00
	.00	.00	.00

EXHIBIT "11"

37592 (11-91)

☐ VOID ☐ CORRECTED

PAYER'S name, street address, city, state, and ZIP code	1 Rents	OMB No. 1545-0115	Miscell
SHELL WESTERN E&P INC. P. O. BOX 4749 HOUSTON, TX 77210-4749	$ .00 2 Royalties $ 99470.27 3 Prizes, awards, etc. $ .00	1991 Statement for Recipients of	
PAYER'S Federal identification number: 760073231	RECIPIENT'S identification number: 373-01-8082	4 Federal income tax withheld: $ .00	5 Fishing boat proceeds: $ .00
RECIPIENT'S name: HILLIARD, KENNETH R ETAL		6 Medical and health care payments: $ .00	7 Nonemployee compensation: $ .00
Street address: 332 FIRST ST.		8 Substitute payments in lieu of dividends or interest: $ .00	9 Payer made direct sales of $5,000 or more of consumer products to a buyer (recipient) for resale ▶ ☐
City, state and ZIP code: MANISTEE MI 49660		10 Crop insurance proceeds: $ 0	11 State income tax withheld: $
Account number (optional): HILP40007/W1		12 State/Payer's state number	

Form 1099-MISC

Department of the Treasury - Internal Revenue

C
For Re

This is im
informat
being furnis
Internal
Service.
requires
return, a
penalty
each
imposed on
income is
the IRS
that it ha

312a

COPY B PRINTED ABOVE IS FOR YOUR TAX RETURN FILED WITH IRS.
COPY C PRINTED BELOW SHOULD BE KEPT FOR YOUR TAX RECORDS.
NOTE: IF THE ABOVE REVENUE AMOUNT (REPORTED TO THE IRS) IS ALSO REPORTABLE TO A STATE, STATE COPY 2 WILL BE PROVIDED (IN DUPLICATE) IN A SEPARATE STATEMENT MAILING.

PLEASE DIRECT ANY QUESTIONS YOU MAY HAVE ABOUT THIS FORM TO THE FOLLOWING ADDRESS:

SHELL WESTERN E&P INC.
1099 COORDINATOR - SOM
P. O. BOX 4457
HOUSTON, TX 77210-4457

INCLUDE YOUR SSN/EIN, AREA CODE/TELEPHONE NUMBER AND ACCOUNT NUMBER ON ANY CORRESPONDENCE YOU MAY SEND TO US.

(2)

No. 98-568

FILED
NOV 4 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH R. HILLIARD and
GREGORY D. STYLES, Trustees under
Trust Agreement dated May 5, 1979,

Petitioners,

v.

SHELL WESTERN E & P, INC.,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Webb A. Smith
Scott A. Storey
FOSTER, SWIFT, COLLINS & SMITH, P.C.
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioners' Statement of Questions Presented is argumentative and contains misrepresentations of fact. The Petition appears to present two questions:

1) Whether Michigan's law of res judicata bars a claim that the same Plaintiffs could have raised in an earlier suit between the same parties and involving the same transaction.

2) Whether the royalty interest owner is responsible for paying the Michigan statutory fee on its share of produced oil and gas.

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COUNTER STATEMENT OF QUESTIONS PRESENTED i

INDEX OF AUTHORITIES iii

COUNTER STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

COUNTER STATEMENT OF THE CASE 3

ARGUMENT 7

I. This Case involved purely State Questions that should not be entertained in this Court

II. Petitioners are not entitled to a Writ of Certiorari

A) Because Petitioners could have raised their claim in their prior suit against Respondent, res judicata bars them from raising it now.

B) The Sixth Circuit's interpretation of Michigan statutory law was correct.

C) The Sixth Circuit did not deprive Petitioners of an opportunity to pursue constitutional claims.

CONCLUSION AND RELIEF REQUESTED 17

INDEX OF AUTHORITIES

CASES — Page(s)

Brown, et al v Sheil Oil, 128 Mich App 867 (1983), reh denied; appeal denied 424 Mich 867 (1986), cert denied 479 US 824 (1986) . . . . . *passim*

Moffit v Kelly, 218 US 400, 405 (1910) 9

Nickel v Cole, 256 US 222 (1921) 9

United States v Johnson, 319 US 302 (1942) 15

STATUTES

MCLA 319.22 1

MCLA §205.301(2) 2

MCLA §205.312 2

COURT RULES

SUP. CT. R. 10 . . . . . 7, 8

COUNTER STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' Statement of "Constitutional and Statutory Provisions Involved" consisted of constitutional provisions that have never been involved in this case. The only pertinent statutory provisions are the following Michigan statutes:

> **MCLA §319.22 Fee for monitoring, surveillance, enforcement, and administration of act**
>
> Sec. 22. (1) For the Purpose of monitoring, surveillance, enforcement and administration of this act, a fee not in excess of 1%, based on the gross cash market value is levied upon all oil and gas produced in this state. The fee shall be collected by the revenue division of the department of treasury in the same manner, at the same time and subject to all the provisions of the tax levied by Act No. 48 of the Public Acts of 1929, being sections 205.301 to 205.317 of the Compiled Laws of 1970.

MCLA §205.301. **Severance tax on oil or gas**

> Sec. 1. There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax.

MCLA §205.312(2). **Persons, producers; defined**

> "Producer" as used in this act means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance. . . . .

COUNTER STATEMENT OF THE CASE

From 1981 through 1986, Petitioners were Plaintiffs in a state court action against Respondent in which they claimed damages for allegedly improper deductions from their royalty checks. In 1984, Petitioners' class was certified and, by a consent judgment, they settled their claims concerning all royalty check deductions except the deduction for their pro-rata share of state severance taxes (Michigan Compiled Laws §2-5/3-1 et seq). The Michigan trial court had already ruled that petitioners were "producers" and therefore subject to the state severance tax. The severance tax issue was reserved out of the settlement to allow Petitioners to pursue their appellate rights. The trial court's ruling was upheld on appeal. Brown, et al v Shell Oil Co., 128 Mich App 867 (1983) reh. Den.;

appeal denied 424 M 867 (1986) cert denied 479 US 824 (1986).

In this case, Petitioners again claimed damages for allegedly improper deductions from their royalty checks. This time, Petitioners alleged that their claim was limited to the propriety of deducting their pro rata share of the state statutory fee. (MCL §319.22(1)). Although Petitioners were informed of this deduction from royalty checks during the course of the Brown, et al litigation, they elected not to challenge that specific deduction. Although Petitioners were free to raise this specific issue at any time during the Brown et al suit, they did not make a specific claim regarding the statutory fee. In 1984, Petitioners' broad claims were resolved by entry of a consent judgment.

Petitioners filed this action in Michigan state court. Because Petitioners included a RICO claim

under federal law (18 USC §1341), Respondent removed the case to the United States District Court for the Western District of Michigan. In its first responsive pleading, Respondent moved to dismiss the Petitioners' claim for two primary reasons. First, Respondent contended that the new claim was barred by Michigan's law of res judicata because the claim arose out of the same transaction as was involved in Brown, et al and because Petitioners could have raised the specific statutory fee claim during the Brown, et al litigation. Second, Respondent contended that the statutory fee was subject to the same provisions as the Michigan severance tax and was therefore partly the responsibility of the royalty interest owner just as the severance tax was.

The District Court rejected Respondent's arguments and entered a judgment in favor of

Petitioners for breach of contract (the federal RICO claims were dismissed). Respondent appealed the judgment to the Sixth Circuit Court of Appeals. Because the issues in this case were purely questions of Michigan law, the Sixth Circuit certified the two issues to the Michigan Supreme Court. The Michigan Supreme Court declined the request.

The Sixth Circuit reversed the District Court's rulings on both res judicata and statutory interpretation. The Court ruled that Petitioners' claims were barred by res judicata because they arose out of the same transactions as were at issue in Brown, and Petitioners could have raised the claims in the earlier suit. The Court also ruled that royalty interests such as Petitioners were subject to the statutory fee because the statute provided that the fee was to be administered

under the provisions of Act 48 (severance tax) and Act 48 clearly included royalty interests within its scope.

The Opinion of the Sixth Circuit was unpublished because it was not precedential.

ARGUMENT

I. This case involved purely State Questions that should not be entertained in this Court.

US Sup. Ct. Rule 10 provides that certiorari is a matter of jurisdictional discretion and will be granted "only for compelling reasons". Respondent contends that this case is woefully lacking in special or important reasons for the discretionary exercise of jurisdiction. The decision below was a plainly correct application of State law to the unique facts of this case. No federal questions were involved, no conflict among

the circuits is alleged, and the Sixth Circuit even elected not to publish its opinion because it is not precedential.

US Sup. Ct. Rule 10 further provides that "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Respondent contends that the Petition for Writ of Certiorari in this case raises primarily allegations of erroneous factual findings, making this case inappropriate for this Court's exercise of discretionary jurisdiction.

As noted by the Sixth Circuit in its Opinion and in its Order Certifying Questions to the Supreme Court of Michigan, this case was controlled by two issues of State law. Petitioners newly coined constitutional challenge was never properly an issue in this case and, if Petitioners desire to challenge the

constitutionality of Michigan's statutory fee, they should direct such a claim against the State of Michigan in another action.

Since the Sixth Circuit applied Michigan's res judicata rules to this case and determined whether Petitioners were subject to the statutory fee, this Court should decline to exercise its discretionary jurisdiction.

> ". . . [The] question whether or not the . . . . interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the constitution of the United States, and which therefore we have no right to review. "Moffit v Kelly, 218 US 400, 405 (1910); Nickel v Cole, 256 US 222 (1921).

The remainder of this brief addresses the specific arguments raised in Petitioners' Petition.

II. Petitioners are not entitled to a Writ of Certiorari

A) Because Petitioners could have raised their claim in their prior suit against Respondent, res judicata bars them from raising it now.

In Argument I of their Petition, Petitioners argue that the decision of the Sixth Circuit deprived them of due process because it gave res judicata effect to the earlier litigation titled Brown, et al v Shell. Petitioners' arguments in this regard are unfounded and false.

The Sixth Circuit correctly recognized that Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that Plaintiff could have brought but did not, as well as those questions that were actually litigated.

The Plaintiffs in this case were also Plaintiffs in the Brown, et al v Shell, class action, which litigated numerous claims concerning proper deductions from royalty checks. Therefore, the Sixth Circuit correctly concluded that the final resolution of Brown. et al v Shell barred Plaintiffs in this case from bringing claims arising out of their royalty interests which were or could have been litigated in Brown.

Plaintiffs' arguments that they could not have raised their current claim in the earlier litigation is nothing more than a mischaracterization of the facts that does not warrant this Court's jurisdiction. Contrary to Plaintiffs' assertion, the Brown, et al v Shell suit was not limited to named class representatives and the class was free to raise the current statutory fee claim had it desired. Unlike this Court, the Sixth Circuit had the benefit of a complete factual record which included the

order certifying the Plaintiff Class in Brown, et al v Shell, and the voluminous pleadings filed by the class, including a revision of the claims made by the class that was filed shortly before the consent judgment was entered.

Respondent contends that Plaintiffs in this case were members of the Plaintiff Class in Brown, et al v Shell and that they were able to bring their current statutory fee claim in Brown had they desired since such a claim arose out of the same transaction as was at issue in Brown. The Sixth Circuit agreed with these facts when it applied res judicata to preclude Plaintiffs from raising the statutory fee claim now. This Court should not grant certiorari, simply because Plaintiffs disagree with the factual findings of a lower court.

B) The Sixth Circuit's interpretation of Michigan statutory law was correct.

Petitioners argue that the Sixth Circuit incorrectly interpreted the Michigan statute and that this alleged misinterpretation of the Michigan Statute constitutes a denial of due process. However, the Sixth Circuit's interpretation of the Statute was correct and, regardless, Petitioners do not allege how the interpretation of the Statute supposedly impairs their due process rights.

The fee-imposing portion of Act 61 provided: "For the purpose of monitoring, surveillance, enforcement and administration of this act, a fee not in excess of 1%, based on the gross cash market value is levied upon all oil and gas produced in this state. The fee shall be collected by the revenue division of the Department of Treasury in the same manner, at the same time and subject to all provisions of the tax levied by [Act 48.]" MCLA § 319.22(1) (emphasis added)

Act 61 provides no other guidance regarding the collection of this statutory fee. However, Act 48 provides that the fee is levied upon each "producer" and then defines "producers" to include the royalty interests. (See Sixth Circuit analysis at pages 28a to 34a of Petitioners Appendix).

The Sixth Circuit engaged in a logical analysis to reach a proper interpretation of the Michigan statute. Absolutely nothing about the Sixth Circuit's analysis of this statute deprived Petitioners of due process.

C) The Sixth Circuit did not deprive Petitioners of an opportunity to pursue constitutional claims.

Petitioners claim that the Sixth Circuit's interpretation of the Michigan statute creates an argument that the statute is unconstitutional. Petitioners then claim that they were denied Due

Process because the Sixth Circuit did not remand the case to the District Court to consider the constitutionality of the Michigan Statute.

Although Respondent disputes Petitioners' assertion that the statutory fee is unconstitutional, this case is not an appropriate vehicle for Petitioners to challenge the statue's constitutionality. Petitioners have always been free to institute an action against the State of Michigan if they believe the statutory fee to be unconstitutional.

Respondent, in fact, shares Petitioners' status as a "producer" and payor of the statutory fee and is not genuinely adverse to Petitioners on this issue. See United States v Johnson, 319 US 302 (1942) Respondent does not "impose" the fee and is no more a guarantor of the constitutionality of the fee than is the mortgagee bank that "pays" property taxes imposed on

mortgagor land owners. If Petitioners truly believe that the fee is unconstitutional, they should seek complete relief in another action.

CONCLUSION AND RELIEF REQUESTED

Petitioners have utterly failed to demonstrate the "compelling reasons" for exercising this Court's discretionary jurisdiction. This case involves no federal constitutional issues, it is a simple case of applying unique facts to a proper interpretation of State law. The decision of the Sixth Circuit is rationally supported by clear statutory provisions and well-reasoned state court rulings. Disappointed in the outcome below, Petitioners have attempted to revise the facts and manufacture new arguments in an attempt to get "one more bite of the apple". That is not this Court's function and the Petition for Writ of Certiorari should be denied.

WHEREFORE, Respondent Shell Western E&P Inc. respectfully requests this Court to deny the Petition for Writ of Certiorari.

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